Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1997

EASTERN NATURAL GAS CORP.,
and DEST EXPLORATION, INC.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a trial court denial of a motion for judgment as a matter of law under FED. R. CIV. P. 50(a) ever be reviewed on appeal when the motion is made at the close of the nonmovant's case, but not renewed at the close of all the evidence?

2. May a court of appeals refuse to rule on a non-frivolous, timely appeal of a denial of a motion for a new trial filed as an alternative to a motion for judgment as a matter of law?

3. May a denial of a motion for partial summary judgment, on an issue which is strictly a question of law, be reviewed on appeal where the summary judgment motion is not renewed as a motion for judgment as a matter of law pursuant to FED. R. CIV. P. 50?

PARTIES TO PROCEEDING

The names of the parties to this proceeding appear on the cover. The Petitioners are corporations owned by individuals. They do not have corporate parents or any subsidiaries.

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2. The court of appeals' failure to rule on ENG's motion for a new trial effectively denied ENG's right to an appeal on that issue and made even more draconian the penalties imposed by the court's determination that ENG's motion for judgment as a matter of law did not comply with FED. R. CIV. P. 50. The Court should grant the Petition to correct this error and require the court of appeals to act on this timely filed, non-frivolous appeal. 12

3. The Court should grant this Petition to resolve a conflict in the circuits on the important question of whether a denial of a summary judgment motion on a matter of law (like other similar pre-verdict decisions on matters of law) may be reviewed on appeal in the absence of a FED. R. CIV. P. 50 motion on the issue. 16

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PETITION FOR WRIT OF CERTIORARI

Eastern Natural Gas Corp. and Dest Exploration Inc. (referred to herein together as "ENG") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit to address important and related questions concerning the interpretation and operation of FED. R. CIV. P. 50.

OPINIONS AND ORDERS BELOW

In the District Court:

1. Order, March 15, 1996 (granting, in part, Alcoa's[1] motion for partial summary judgment and denying ENG's motion for partial summary judgment)(R.76).

2. Order, in open court, August 21, 1996 (denying ENG's motion for judgment as a matter of law on the Alcoa fraud counterclaim) (Conference Tr. Vol. 8 at 1501).

3. Judgment, August 29, 1996 (entered on jury verdict against ENG on its claims and on the Alcoa counterclaim) (R. 122).

4. Amended Judgment, September 3, 1996 (amending the case caption) (R. 122).

5. Order and Ruling on Post-Trial Motions, November 14, 1996 (denying generally ENG's post-trial motions, but

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[1] Respondent, Aluminum Company of America (referred to hereinafter as "Alcoa").

granting a new trial unless Alcoa accepted remittitur reducing the damage recovery on its counterclaim to $397,338) (R. 138).

6. Amended Judgment, December 11, 1996 (reflecting Alcoa's acceptance of remittitur) (R. 140).

In the Court of Appeals:

7. Opinion, October 3, 1997, published as *Eastern Natural Gas Corp. v. Aluminum Co. of America*, 126 F.3d 996 (7th Cir. 1997) (App. A1).

8. Order, December 1, 1997, denying ENG's Petition for Rehearing (App. A15).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit giving rise to this Petition was issued October 3, 1997 (App. A1). ENG's timely-filed Petition for Rehearing was denied by the court of appeals by an order filed December 1, 1997 (App. A15). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1)(1995).

STATUTES AND RULES INVOLVED

FED. R. CIV. P. 50:

> **Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings**

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial;

and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

ENG filed this action in the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C. §1332 (1995). ENG alleged that Alcoa had breached an agreement to sublease (the "Sublease") and an August 1991 letter agreement. (R. 1, Complaint.) These contracts involved the grant by Alcoa of rights to explore for and develop natural gas and oil on property owned by Peabody Development Company ("Peabody"), but leased by Peabody to Alcoa. ENG claimed that Alcoa breached its agreements with ENG by, among other things, declaring ENG in default

of the Sublease, and then terminating the Sublease, because of alleged failures of ENG to satisfy certain requirements of the lease (the "Lease") between Alcoa and Peabody. Alcoa declared ENG in default of the *Sublease* for the alleged failure of ENG to comply with the *Lease*, but Peabody never declared a default under the Lease.

Both sides filed motions for partial summary judgment. (R. 29, Defendant's Motion, and R. 33, Plaintiffs' Motion.) For its motion for partial summary judgment, ENG argued that, as a matter of contract construction, and therefore a matter of law for the court, the Sublease did not give Alcoa the right to declare a default unless a default was declared under the Lease by Peabody.[2] The district court granted Alcoa's motion and ruled that the August 1991 letter agreement was not an enforceable contract. (R. 76.) The district court denied ENG's motion for partial summary judgment. (R. 76).

On August 1, 1996, the Court granted Alcoa's motion to withdraw its contract counterclaims and add a fraud claim (R. 102), and trial of the ENG breach of contract claims and the Alcoa counterclaim began on August 12, 1996. At the close of Alcoa's case, counsel for ENG moved for a judgment as a matter of law on the Alcoa fraud counterclaim. That motion was denied, and the trial court indicated that the counterclaim would be submitted to the jury. (Conference Tr.

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[2] The Sublease, in Section 2(f), provided that: *"ENG shall be entitled to the exclusive right to exercise all the rights and privileges granted to . . . Alcoa under the Lease . . . ."* (Plaintiff's Trial Exhibit 6.) ENG argued that this phrase must necessarily mean that ENG could stay in possession of the property as long as Alcoa had the right to possession of the property, i.e., until Peabody declared a default and terminated the Lease.

Vol. 8 at 1501.) Counsel for ENG then read parts of several depositions to the jury.[3] Counsel for ENG did not renew the Rule 50 motion at the close of all the evidence (the reading of the deposition excerpts) later the same day.

The jury returned a verdict against ENG on its breach of contract claims and returned a verdict of $450,000 against ENG on the Alcoa fraud counterclaim. (This amount was later reduced to $397,399 with the Alcoa acceptance of remittitur ordered by the district court (R. 140).) The district court denied the ENG post-trial motions and ENG appealed.

The court of appeals affirmed the trial court. The court declined to review the ENG motion for judgment as a matter of law on the fraud counterclaim because, while counsel moved for judgment at the close of Alcoa's case, he did not renew the Rule 50 motion at the close of all the evidence.[4]

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[3] Parts of all of these depositions had already been read to the jury as part of Alcoa's case. The parts introduced by ENG were introduced in rebuttal and not during Alcoa's case in chief, as a way, offered by counsel to ENG, of possibly shortening the reading (because reserving the reading until rebuttal would give counsel more time to condense the presentation). Tr. Vol. 7 at 1084.

[4] Alcoa never claimed to have been prejudiced by the failure of ENG to renew its Rule 50 motion at the close of all the evidence. In fact, neither the district court nor counsel for Alcoa ever raised the issue of the timeliness of the ENG Rule 50 motion. At the beginning of his oral argument in this case, counsel for ENG volunteered to the court of appeals that he had recently become aware of the court's decision in *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir. 1995), but counsel argued that *Umpleby* should not bar consideration of the Rule 50 motion in this case and

Eastern Natural Gas, supra, at 1000 (App. A8). The court of appeals opinion does not mention the ENG alternative motion for a new trial on the fraud counterclaim, other than to acknowledge that ENG had moved for a new trial on the fraud counterclaim and that ENG had appealed the trial court's denial of that motion. *Eastern Natural Gas, supra,* at 999 (App. A5). In addition, the court declined to review the district court's denial of ENG's summary judgment motion (on the construction of the contract), finding that the issue was moot after trial (citing *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994)). *Eastern Natural Gas, supra,* at 1002 (App. A12).[5]

REASONS FOR GRANTING THE WRIT

These closely related questions call for the Court's interpretation of the requirements of FED. R. CIV. P. 50. The issues arise frequently, with literally dozens of recent reported

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that *Umpleby* did not bar consideration of the ENG's motion for a new trial on the counterclaim in any event. The issue was not raised by anyone until counsel for ENG candidly brought up *Umpleby* and addressed its requirements.

[5] ENG also argued to the court of appeals that it was entitled to a new trial on its breach of contract claims because: (a) ENG was prejudiced by the trial court's decision to allow Alcoa to add its fraud counterclaim 11 days before trial, (b) Alcoa withheld material evidence, (c) the district court denied ENG the right to introduce Alcoa's prior inconsistent statements (in interrogatory answers and other pleadings), and (d) the district court erred in ruling that the August 1991 Letter Agreement between ENG and Alcoa was not an enforceable contract. These issues are not raised in this Petition.

decisions on the issues, and the circuits are badly split. On one side of the issues are those circuits which hold that Rule 50 is "a particularly clear and mechanical rule of law" which does not allow the trial judge to "wave his magic wand" to dismiss the rule's procedural requirements as a "technicality." *E.g., Redd v. City of Phenix City*, 934 F.2d 1211, 1214 (11th Cir. 1991). On the other side of the issues are those circuits which hold that: "slavish application of the rule would be 'to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules.'" *E.g., Borhrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983), *cert. denied* 465 U.S. 1026 (1984), *quoted favorably in Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U. S. 855 (1990).

1. **The Court should grant this Petition to resolve the question of whether the failure to renew a motion for judgment as a matter of law at the close of all the evidence may be excused where there has been substantial compliance with FED. R. CIV. P. 50 and the purposes of the rule have been met. This important question is frequently litigated, and the decisions of the circuit courts are irreconcilably in conflict.**

The court of appeals here ruled that ENG's Rule 50 argument was not preserved, even though made at the close of Alcoa's case, because it was not renewed at the close of all the evidence later that day. *Eastern Natural Gas, supra,* at 1000 (App. A8). The court relied on its decision in *Umpleby v. Potter & Brumfield, Inc.*, 69 F..3d 209 (7th Cir. 1995), in which the court "ruled unequivocally that in order to preserve

a motion for judgment as a matter of law which was not granted by the trial court, the motion must be renewed at the close of all the evidence." *Eastern Natural Gas, supra,* at 1000 (App. A8). The Seventh Circuit is of the view that "when Rule 50 was reevaluated and amended in 1991 the advisory committee deliberately retained the requirement to move for judgment prior to the close of the trial" and that, consequently, a rigid interpretation of Rule 50(b), while possibly not required before the 1991 amendments, is required after the 1991 amendments. *Umpleby,* 69 F.3d at 212.

The same harsh construction of the requirements of Rule 50 has been adopted in the Third and Eleventh Circuits (although not because of any reasoning from the 1991 amendments to the Rules). *Mallick v. Int'l. Bhd. of Elec. Workers*, 644 F.2d 228 (3rd Cir. 1981); *Redd v. Phenix City, Ala.*, 934 F.2d 1211 (11th Cir. 1991).[6]

The First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have ruled that Rule 50(b) does not unequivocally require that a motion for judgment as a matter of law be filed at the close of all the evidence in order for the

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[6] See, also *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353 (7th Cir. 1996); *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132 (7th Cir. 1994); *Mark Seitman & Assoc. v. R. J. Reynolds Tobacco Co.*, 837 F.2d 1527 (11th Cir. 1988); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3rd Cir. 1978)(review denied even though Rule 50(a) motion was made at the close of the plaintiff's case and made at the close of the evidence in a written motion delivered to the judge's law clerk, but not brought to the judge's attention); *Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken*, 536 F.2d 9 (3rd Cir. 1976), *cert. denied,* 429 U.S. 966 (1976).

matter to be preserved on appeal. *Robles-Vazquez v. Garcia,* 110 F.3d 204 (1st Cir. 1997)(recognizing a "plain error" exception to the close of all the evidence rule, but finding the exception not applicable in this particular case); *Gibeau v. Nellis*, 18 F.3d 107 (2nd Cir. 1994) (recognizing exception to close of the evidence rule to prevent manifest injustice); *Singer v. Dungan,* 45 F.3d 823 (4th Cir. 1995); *Tamez v. San Marcos, Texas,* 118 F.3d 1085, 1090 (5th Cir. 1997) (failure to make a motion for judgment at the close of the evidence was "a technical, formalistic defect, not a substantive one"); *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U.S. 855 (1990)(court avoided adherence to "slavish nominalism" and ruled that, where trial court had indicated, in response to motion for judgment as a matter of law, that the case would be submitted to the jury, and the evidence admitted after the motion was brief and of little consequence, renewing the motion at the close of all the evidence would serve no useful purpose); *BE&K Constr. Co. v. United Bhd. of Carpenters*, 90 F.3d 1318 (8th Cir. 1996); *Trujillo v. Goodman*, 825 F.2d 1453 (10th Cir. 1987).[7] One

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[7] See, also *O'Connor v. Huard*, 117 F.3d 12 (1st Cir. 1997)(recognizing "plain error" exception); *Bay Colony, Ltd. v. Trendmaker, Inc.*, 121 F.3d 998 (5th Cir. 1997)(recognizing exceptions to the close of the evidence rule and finding that objections to jury instructions were sufficient to preserve post-trial motion for judgment as a matter of law); *Satcher v. Honda Motor Co.*, 52 F.3d 1311 (5th Cir. 1995), *cert. denied*, 516 U. S. 1054 (1996); *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950 (5th Cir. 1993); *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995)(finding, however, that defendant did not fall within exception to the close of the evidence rule); Jusino v. Zayas, 875 F.2d 986 (1st Cir. 1989)(recognizing substantial compliance exception to

commentator suggests that there are five variations in the circuits of what the author characterizes as the liberal application of Rule 50(b). Rollin A. Ransom, Note, *Toward a Liberal Application of the "Close of all the Evidence" Requirement of Rule 50(B) of the Federal Rules of Civil Procedure: Embracing Fairness Over Formalism*, 91 Mich. L. Rev. 1060 (1993).

In addition, a number of circuits have held that any objection to a failure to renew a motion for judgment as a matter of law at the close of all the evidence will be waived where (as here) the nonmoving party fails to raise the objection with the trial court. *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429 (5th Cir. 1996); *Gibeau v. Nellis*, 18 F.3d 107, 109 (2d Cir.1994); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104 (6th Cir.1987), *cert. denied*, 484 U.S. 913 (1987); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 293-95 (8th Cir.1982), *cert. denied*, 459 U.S. 1205 (1983).

2. The court of appeals' failure to rule on ENG's motion for a new trial effectively denied ENG's right to an appeal on that issue and made even more draconian the penalties imposed by the court's determination that ENG's motion for judgment as a matter of law

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close of the evidence rule); *American Protein Corp. v. AB Volvo*, 844 F.2d 56 (2nd Cir. 1988), *cert. denied*, 488 U.S. 852 (1988); *Boynton v. TRW, Inc.*, 858 F.2d 1178 (6th Cir. 1988)(en banc); *Jones v. City of St. Clair*, 804 F.2d 478 (8th Cir. 1986); *Ebker v. Tan Jay Int'l, Ltd*, 739 F.2d 812 (2nd Cir. 1984); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

did not comply with FED. R. CIV. P. 50. The Court should grant the Petition to correct this error and require the court of appeals to act on this timely filed, non-frivolous appeal.

Other than acknowledging that ENG moved for a new trial on the fraud counterclaim and appealed the trial court's denial of that motion, *Eastern Natural Gas, supra*, at 999 (App. A5), the court of appeals made no other mention of the issue. This failure of the court to address the issue was pointed out in ENG's Petition for Rehearing (App. A24), but the petition was denied, and ENG was effectively denied the right to appeal the trial court's decision on ENG's motion.

If the court decided[8] that the motion for new trial was waived because ENG did not file its Rule 50(a) motion at the close of all the evidence, the decision is contrary to Seventh Circuit precedent. The court of appeal's ruling that *Umpleby* bars consideration of the Rule 50 motion should not have affected the consideration of the motion for a new trial. The *Umpleby* opinion makes clear that a request for a new trial based on insufficient evidence is normally:

> [A] viable alternative where a party, as here, might be entitled to judgment as a matter of law but for some reason did not move for judgment at the close of all evidence. 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2539 at 362 (2nd ed. 1995).

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[8] It is not clear from the opinion that the court "decided" anything with respect to the motion for new trial, but the effect of the opinion was to deny any consideration of the motion for new trial and to deny the new trial.

Umpleby, 69 F.3d at 212-213. To the same effect is the Seventh Circuit's decision in *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353 (7th Cir. 1996). See, also, *Mark Seitman & Assoc., Inc. v. R. J. Reynolds Tobacco Co.*, 837 F.2d 1527 (11th Cir. 1988); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2531 (Supp. 1997).

Regardless of whether there was any rationale for the court's failure to consider the motion for new trial (or to illuminate its consideration), the effect of the opinion was to impose even more draconian penalties for what the court perceived was a failure to comply with the strict requirements of Rule 50(a). Not only was ENG denied any consideration of the merits of its motion for judgment as a matter of law on the counterclaim, the merits of its motion for a new trial were not considered.

The ENG motion for a new trial on the fraud counterclaim cannot be dismissed as so frivolous as to be unworthy of any explicit consideration by the court of appeals. The Alcoa fraud theory evolved during the course of the trial, but in its final version the theory was that: (i) had Alcoa learned of the fraud in January of 1989, the existence of the fraud would have allowed Alcoa to terminate the agreements with ENG, (ii) it would not have subleased the property to anyone else, and (iii) consequently, Alcoa would have saved all of the time and expense it incurred in administering the property between January of 1989 and the Spring of 1994, when the contracts were terminated. During his argument in response to ENG's Fed. R. Civ. P. 50(a) motion, counsel for Alcoa recognized the problems with its proof; the best he could say was that the proof showed that Alcoa *"might"* have abandoned the project; that termination of the project and

resulting savings was *"definitely a possibility"*. (Conf. Tr. Vol. 8 at 1504.)

The Seventh Circuit has held, in a similar case, that "the plaintiff must show that, had it not been for the fraud, he would have been spared an injury and thus would be better off." *Midwest Commerce Banking Co. v. Elkhart City Centre*, 4 F.3d 521, 524 (7th Cir. 1993). The district court's denial of a new trial in this case cannot be reconciled with the decisions, like *Midwest Commerce Banking*, that require damage awards to be supported by more than just speculation.

The appeal in *Mid-America Tablewares, Inc., v. Mogi Trading Co.*, 100 F.3d 1353 (7th Cir. 1996), like the appeal in this case, involved a claim that the proof did not support the award of damages. Yet, there, the defendant's motion for a new trial was considered and granted in spite of its failure to preserve its Rule 50 motion for judgment as a matter of law. The court of appeals ordered a new trial and pointed out that "we take seriously the responsibility of an appellate court to review the sufficiency of the evidence to support the award of damages." *Id.* at 1368. The court had the ability and responsibility to review the verdict in connection with ENG's motion for a new trial. *Cf. Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). When it did not do so in this case, it abdicated its responsibility.

Consideration of the propriety of a new trial is ordinarily closely connected to consideration of a motion for judgment as a matter of law, and a motion for a new trial may be made even if a Rule 50(a) motion was not made before the jury verdict was returned. Here, the failure of the court of appeals to consider (or at least to say that it considered) the timely filed, non-frivolous appeal of the denial of the motion for new

trial essentially denied ENG the right to appeal on that issue and "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10. Moreover, as a practical matter, reconsideration of ENG's motion for judgment as a matter of law, which ENG urges the Court is warranted, should necessarily include review of the motion for new trial, in which the same issues are raised.

3. The Court should grant this Petition to resolve a conflict in the circuits on the important question of whether a denial of a summary judgment motion on a matter of law (like other similar pre-verdict decisions on matters of law) may be reviewed on appeal in the absence of a FED. R. CIV. P. 50 motion on the issue.

The Seventh Circuit refused to review the denial of ENG's motion for summary judgment (on the interpretation of the Sublease), relying on its decision in *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir.1994) for the proposition that a summary judgment denial may be reviewed only where the plaintiff notifies the court that it intends to abandon certain claims at trial if the motion is denied.[9] *Eastern Natural Gas, supra,* at 1002 (App. A13).

The Fourth, Fifth, Sixth, Eighth, Ninth, and Federal Circuits have similarly ruled that a summary judgment denial is never reviewable or is only reviewable if renewed as a Rule

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[9] *But, see, Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569 (7th Cir. 1995), discussed below.

50 motion for judgment as a matter of law. *Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp.*, 51 F.3d 1229 (4th Cir. 1995)(rejecting a legal versus factual distinction as affecting review on appeal); *Black v. J.I. Case Co.*, 22 F.3d 568 (5th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir.1990); *Metropolitan Life Ins. Co. v. Golden Triangle*, 121 F.3d 351 (8th Cir. 1997); *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352 (9th Cir.1987); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564 (Fed.Cir.1986), *cert. dismissed*, 479 U.S. 1072 (1987). See, also, *Lamc v. Borras*, 16 F.3d 473 (1st Cir.1994)(in which the court suggests, at note 5, that if it were to address the question, it would not review a denial of a summary judgment motion).

The Third and Tenth Circuits, on the other hand, hold that a denial of a summary judgment motion on a matter of law (as opposed to a question of the sufficiency of the evidence) can be reviewed after trial. *Pennbarr Corp. v. Insurance Co. of North America*, 976 F.2d 145 (3rd Cir. 1992)(denial of summary judgment on contract interpretation issue was appropriate for review after trial on the merits - directly contrary to *Metropolitan Life Ins. Co. v. Golden Triangle*, 121 F.3d 351 (8th Cir. 1997), which was also a contract interpretation case); *Ruyle v. Continental Oil Co.*, 44 F.3d 837, 841-42 (10th Cir.1994), *cert. denied*, 516 U.S. 906 (1995).[10] The court in *Ruyle*, in a decision reversing denial of summary judgment on a collateral estoppel issue, ruled that:

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[10] See, also, *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515 (10th Cir. 1997)(court may review denial of summary judgment on a purely legal question, although the case there did not involve such a question); *Wilson v. Union Pacific R.R. Co.*, 56 F.3d 1226 (10th Cir.1995).

"[a] party who properly raises an issue of law before the case goes to the jury 'need not include the issue in a motion for a directed verdict in order to preserve the question on appeal.'" *Id.* at 841-42 (quoting from *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987)).

Until its decision in this case, the Seventh Circuit was more in line with the Third and Tenth Circuits than with the other circuits which have held that denials of summary judgments are not reviewable on appeal. Subsequent to its 1994 decision in *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994), the Seventh Circuit adopted a law-versus-facts distinction in determining whether a denial of a summary judgment motion may be reviewed on appeal. *Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569 (7th Cir. 1995). In reviewing the trial court's decision on a choice of law issue (raised in a summary judgment motion which had been denied), the court of appeals there held that the motion on the choice of law issue was "not equivalent to a motion for summary judgment" (although it was called that by the movant). *Id.* at 571. The court went on to say:

> [T] the choice of law decision is sufficiently independent of the ultimate summary judgment inquiry -- whether there are disputed facts that would lead to different legal results depending on how they are interpreted -- to warrant review independent from any available review of the ultimate summary judgment decision.

Id. at 572. The ENG briefs to the Seventh Circuit in this case called the court's attention to *Gramercy Mills*,[11] but the court's opinion contains no mention of that decision.

The authors of a leading treatise on federal practice have reached the same conclusion as have the Third and Tenth Circuits:

> [T]he denial of a Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits. *At that time*, the party who unsuccessfully sought summary judgment may argue that the trial court's denial of the Rule 56 motion was erroneous.

10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* §2715 at 636-638 (2nd ed. 1983) (emphasis supplied).

Other circuits have ruled that denials of other pre-verdict motions on legal issues (motions in limine, for example) are reviewable in circumstances which are indistinguishable from summary judgment denials except with respect to the name of the motion. In *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365 (9th Cir. 1987), for example, the court of appeals held that it could review the denial of the defendant's motion in limine (for a determination that the contract in question was unenforceable because of the statute of frauds), even though the defendant had failed to make a Rule 50 motion on the issue. See, also, *Jurgens v. McKasy*, 927 F.2d

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[11] Brief for Appellants at 17, 45, 46; Appellants' Petition for Rehearing at 7-8 (App. A25-26).

1552 (Fed. Cir. 1991)(in which the court reviewed the legal issue of "obviousness" in a patent case even though the appellant had not raised the issue in a Rule 50 motion for directed verdict).

Authors Wright, Miller and Kane also are of the view that the law versus facts distinction still is important and that errors of law can be reviewed on appeal without the filing of a Rule 50 motion:

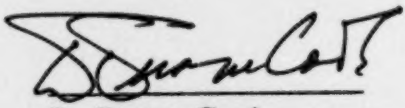
> A renewed motion for judgment as a matter of law under Rule 50(b) is not a condition precedent to appeal from a final judgment. If there have been errors at the trial, duly objected to, dealing with matters other than the sufficiency of the evidence, they may be raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter of law or a motion for a new trial, although it is better practice for the parties to give the trial court an opportunity to correct its errors in the first instance.

9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §2540, at 366 (2nd ed. 1995).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted:



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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-4117

EASTERN NATURAL GAS CORPORATION
and DEST EXPLORATION INCORPORATED,
Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District or Indiana, Evansville Division.
No.94 C 110-Gene E. Brooks, *Judge.*

ARGUED MAY 22, 1997-DECIDED OCTOBER 3, 1997

Before **COFFEY, EASTERBROOK and ROVNER,**
Circuit Judges.

ROVNER, *Circuit Judge.* Eastern Natural Gas Corp. ("ENG") and Dest Exploration, Inc. ("Dest") discovered that going on the offensive is not always the best strategy. When they sued Aluminum Company of America ("ALCOA") for

breach of contract, ALCOA countersued for fraud. Dest and ENG lost on both claims before a jury and now appeal. We affirm.

I.

ALCOA owned the rights to drill for oil and gas on approximately 40,000 acres of property in Indiana owned by Peabody Development Company. Commensurate with these rights, ALCOA acquired certain obligations to drill on and develop the land. In 1988, ALCOA sublet its rights in the land to ENG in an agreement that required ENG to spend a certain amount of money on the property, and which also required ENG to meet certain drilling obligations. ENG and ALCOA also entered into a gas purchase agreement (the "GPA") which obliged ALCOA to buy from ENG the gas produced from the Peabody land. The Sublease and the GPA were later assigned to Dest with ALCOA's consent. In 1991, after the GPA expired by its own terms, Dest and ALCOA signed a "Letter Agreement" which Dest claimed required ALCOA to enter into a new gas purchase agreement at higher prices.

Dest did not keep up with its contractual obligations and ALCOA began sending notices of default to Dest and ENG in 1993. ALCOA complained that Dest was not drilling the number of wells it was required to drill under the Sublease. Dest countered that it was relieved of its drilling obligations in 1993, and that ALCOA's actions made it impossible for Dest to drill in 1993. Dest also charged ALCOA with

anticipatory repudiation of the GPA. Although ALCOA was not aware of it at the time. Dest was also defaulting on its spending obligation. Larry Corwin, the president of Dest, tried to cover up Dest's failure to meet spending requirements by creating a false invoice in the amount of $81,400, from Geodata Corp., a supplier of geophysical information. Corwin also falsified other documentation to back up the forged invoice so that ALCOA would not discover his deception, and so that ALCOA would believe that Dest and ENG were meeting their spending obligation.

In 1994, Dest sued ALCOA for breach of the Sublease and breach of the Letter Agreement. ALCOA counterclaimed, charging Dest and ENG with negligence in drilling a particular well on the Peabody land, with breaching the Sublease by failing to drill the number of wells required, and with breach of the Letter Agreement. Both sides eventually moved for partial summary judgment. The district court rejected as a matter of law ENG's argument that ALCOA could not declare ENG in default of the Sublease ˜ess and until Peabody declared ALCOA in breach of the primary lease. The court found that although no one disputed that ENG failed to meet the minimum drilling requirements, questions of fact remained about whether ALCOA had prevented ENG from performing the drilling terms of the Sublease. Thus, the court held that issues of fact precluded summary judgment on the issue of which party breached the Sublease.

The district court also found that the Letter Agreement was not a valid contract because it was too indefinite in its terms to be enforceable.[12] At most, the court found, the Letter Agreement was a promise to negotiate in order to come to specific terms for a new gas purchase agreement at some later date. Thus, the district court granted summary judgment in favor of ALCOA on Dest and ENG's claim for breach of the Letter Agreement.

Several months before trial on the remaining issues, ALCOA, in the course of conducting third party discovery, uncovered a discrepancy between invoices produced by third party Geodata and invoices produced by ENG and Dest related to Geodata. ALCOA promptly moved to reopen discovery, and the trial court allowed ALCOA to depose Larry Corwin, the president of ENG. As a result of this deposition, ALCOA determined that Corwin had forged an $81,400 invoice from Geodata in order to make it appear to ALCOA that ENG was meeting its spending obligation under the Sublease. Corwin had also created a check, purportedly to Geodata, which was actually deposited in a Dest account. In addition to this deception, Corwin created "vendor analysis forms" which showed dummy payments to two other vendors, all in furtherance of the scheme to make it appear that ENG was meeting

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[12] After uncovering evidence of fraud committed by Dest's president, ALCOA sought leave to amend its counterclaim so that it could withdraw the contract counterclaim based on the Letter Agreement, and add a claim based on the fraud. As we discuss *infra*, the district court did not abuse its discretion in allowing ALCOA to make these amendments.

its spending obligation. All of this false documentation was presented to ALCOA with the intention that ALCOA rely on the information. And ALCOA did, in fact, rely on the false documentation in deciding to continue its relationship with Dest and ENG. One ALCOA witness, accountant Jerry Van Wert, testified that he "seriously doubt[ed]" whether ALCOA would have continued its relationship with ENG if it had known that ENG was forging documents. ALCOA's in-house counsel, John Holsinger, testified that ALCOA would have "absolutely" terminated its relationship with Dest if it had known that Corwin was lying and forging documents in order to show that it was meeting the spending requirement. Finally, ALCOA employee John Hemphill testified that ALCOA was damaged by relying on the false documents because it continued to work with ENG for a long period of time, expending resources it would not have otherwise spent.

Immediately after the Corwin deposition and approximately three months before trial, ALCOA moved to amend its complaint to add a counterclaim for fraud. Eleven days before trial was to begin, the court allowed the amendment. The jury found for ALCOA on both of ENG and Dest's claims and on ALCOA's counterclaims, rendering a verdict for ALCOA in the amount of $450,000. Because the evidence did not support a verdict in that amount, and because ALCOA was willing to accept a remittitur, the court amended the amount of the judgment to $397,339. Dest and ENG moved for judgment as a matter of law and for a new trial on the breach of contract claim and on the fraud counterclaim, and the trial court denied the motions.

II.

Dest and ENG now appeal from the jury verdict and from the district court's earlier summary judgment ruling, citing a number of alleged errors. They argue that ALCOA did not prove its fraud claim because it did not prove reliance on the false documentation. Furthermore, they argue, the trial court should not have granted ALCOA leave to amend its complaint to add the fraud counterclaim only eleven days before trial because this prejudiced Dest and ENG. On the breach of contract claim, Dest and ENG claim entitlement to a new trial because ALCOA allegedly withheld material evidence and because the trial court refused to allow Dest and ENG to use certain ALCOA pleadings to impeach ALCOA witnesses. Dest and ENG also argue that the district court erred when it ruled on summary judgment that the Letter Agreement was not an enforceable contract and when it ruled that ALCOA could declare default on the Sublease before Peabody declared default on the primary lease. Finally, they claim prejudice to their contract claims from the court's allowance of the fraud claims "on the eve of trial." As we shall see, none of these arguments has any merit.

A.

Because much of the plaintiffs' argument is premised on the district court's allowance of ALCOA's motion to amend the complaint to add the fraud counterclaim, we will address that issue first. We review the district court's grant of a motion to amend for abuse of discretion. *Sanders V. Venture Stores, Inc.*, 56 F.3d 771, 773 (7th Cir. 1995). Federal Rule of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires." Thus, we have held

that in the absence of undue delay, undue prejudice to the party opposing the motion, or futility of the amendment, leave should be freely given. *Sanders,* 56 F.3d at 773. Plaintiffs claim they were prejudiced by the late addition of ALCOA's fraud counterclaim to the case because they had insufficient time to answer the counterclaim, prepare for trial on the existing claims and the fraud claim, and engage in any meaningful discovery on the fraud claim. Not surprisingly, plaintiffs focus on the fact that the district court granted leave to amend eleven days before trial began. ALCOA, of course, emphasizes the fact that it moved to add the claim more than two months before the trial date, immediately after uncovering the fraud through third party discovery. ALCOA also points out that plaintiffs were on notice of the possible addition of a fraud counterclaim as soon as ALCOA moved to reopen discovery, approximately three months before trial. Because of this, ALCOA asserts, Dest and ENG had two months to conduct additional discovery and prepare for trial on the original claims as well as the fraud counterclaim. ALCOA also argues that Dest and ENG had the additional benefit of having within their control much of the information regarding the alleged fraud.

The district court carefully considered the potential for prejudice to Dest and ENG. In order to minimize any prejudice, the court allowed plaintiffs to take necessary discovery regarding the fraud claim, and indeed, plaintiffs deposed ALCOA's accountant regarding ALCOA's reliance on the fraud. Dest and ENG belatedly list other discovery they would have taken had they had more time. We have no doubt that plaintiffs wish in hindsight that they had allocated their pretrial resources in a different manner. Although plaintiffs

would have us believe that they had a mere eleven days to prepare for the counterclaim, they in fact were on notice of the counterclaim months before trial. Furthermore, as far as we can tell from the record, plaintiffs did not request a continuance of the trial date in order to facilitate this additional discovery. Dest and ENG have offered no reason for us to believe the district court abused its discretion in allowing the amendment. We will not second-guess the considered judgment of the district court.

B.

ENG and Dest contend that even if the trial court properly allowed the fraud claim, ALCOA failed to prove the claim because it presented no evidence that ALCOA relied on the fraudulent documents to its detriment. Plaintiffs argue that they are entitled to judgment as a matter of law on this claim, but we need not consider the merits of this issue because plaintiffs have waived this claim. As plaintiffs admitted at oral argument, they failed to file a Rule 50 motion for judgment as a matter of law at the close of all the evidence at trial. Instead, they moved for judgment as a matter of law at the close of ALCOA's evidence, but before they presented rebuttal evidence. Dest and ENG conceded at oral argument that our ruling in *Umpleby V. Potter & Brumfield, inc., 69* F.3d 209 (7th Cir. 1995), is determinative here. In *Umpleby,* we ruled unequivocally that in order to preserve a motion for judgment as a matter of law which was not granted by the trial court, the motion must be renewed at the close of all the evidence. 69 F.3d at 212. Dest and Eng admittedly failed to preserve their Rule 50 argument.

C.

Dest and ENG also claim they are entitled to a new trial on their contract claim because ALCOA withheld material evidence, and because the trial court refused to allow Dest and ENG to use certain pleadings to impeach ALCOA witnesses. We review for abuse of discretion a trial court's refusal to grant a new trial. *M. T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1407 (7th Cir. 1991). We grant a new trial only when the verdict is against the clear weight of the evidence, and will not set aside a jury verdict if a reasonable basis exists in the record to support the verdict. *Id.* Dest and ENG face an uphill battle here.

Plaintiffs claim that ALCOA withheld documents to which they were entitled once ALCOA decided to put its in-house counsel on the stand. ALCOA had withheld as attorney-client privileged the files of Mark Holsinger, its in-house counsel. ALCOA listed Holsinger as a potential trial witness weeks before trial began, and Dest and ENG made no effort to compel production at that time of the previously withheld documents. At trial, Holsinger was called to testify about, among other things, ALCOA's reliance on the fraudulent Geodata invoice and supporting documentation. Mter Holsinger testified for a day, Dest and ENG called for the production of privileged documents, and in particular for "Mr. Holsinger's notes and his memos to the Alcoa people and the Alcoa's people [sic] memos to him." *See* Transcript of Jury Trial, Volume 5, at p.813. This request was made on a Friday afternoon, and on Sunday night, certain documents from Holsinger's files were produced to the plaintiffs. On Monday morning, plaintiffs complained to the court that although

ALCOA had produced correspondence *from* Holsinger, they had not produced correspondence *to* Holsinger. With Holsinger about to retake the stand, counsel for ENG and Dest commented to the court that the problem of the missing documents was "not something that we need to deal with on this witness." *See* Transcript of Jury Trial, Volume 6, at p.828. Dest and ENG did not raise the issue of the missing documents again before the trial court.

On appeal, they 4aim that "[a]fter the trial, and not earlier" they learned that ALCOA had not produced all of the privileged documents to which they believed they were entitled. Because of this withholding, Dest and ENG claim they are entitled to a new trial. But again, Dest and ENG have waived this claim. By their own admissions, they knew during trial that ALCOA had not produced all of the documents in question, but they failed to object, or move to preclude testimony or to compel production, or even request a continuance so that they could determine what to do about any missing documents. They admitted in their brief to this Court that they were "dimly aware" that the requested production was not complete, but they did nothing at trial to remedy that situation. They were aware enough to raise the issue with the district court that Monday morning, but then informed the district court that the issue need not be addressed during Hol singer's testimony. It was up to Dest and ENG to raise the issue anew before they were prejudiced by the fa˜ure to produce, and certainly before the end of trial. We will not address the issue of prejudice from the missing documents for the first time on appeal.

Nor are we persuaded that Dest and ENG are entifled to a new trial because the district court refused to allow them to use certain superseded pleadings to impeach ALCOA witnesses. We review for abuse of discretion any evidentiary rulings of the district court. *Whalen u. Rubin,* 91 F.3d 1041, 1046 (7th Cir. 1996). The district courts have broad discretion to make rulings under Federal Rule of Evidence 403, and we are reluctant to second-guess them. *Id.* After discovering the potential fraud claim, ALCOA moved to amend its complaint and other pleadings to withdraw some claims and add another. The amendment at issue here is ALCOA's withdrawal of its breach of contract claim, based on the Letter Agreement. When Dest and ENG attempted at trial to introduce ALCOA's prior pleadings, ALCOA moved under Rule 403 to exclude the prior pleadings as unnecessarily confusing in an already complex case. The district court agreed that the case was complex and that certain parts of the prior pleadings would likely confuse the jury. But the district court was also concerned about fairness to Dest and ENG, because they may have been relying on these pleadings in shaping their case. The district court resolved this conflict by ruling that documents involving withdrawn legal theories (as opposed to withdrawn factual theories) were not admissible, but that Dest and ENG could question any ALCOA witnesses concerning any statement, whether factual or legal, made in the prior pleadings. Thus, although the pleadings were not admitted as evidence, Dest and ENG were allowed to use the prior pleadings to impeach witnesses or to refresh recollection, minimizing any prejudice.

Dest and ENG rely on *Contractor Utility Sales Co. v. Certain-teed Products Corp.,* 638 F.2d 1061 (7th Cir. 1981),

and *Buscaglia v. United States,* 25 F.3d 530 (7th Cir. 1994), to support their contention that the district court abused its discretion in refusing to admit the prior pleadings as evidence. Neither supports plaintiffs' position, however. In *Certain-teed Products,* the district court concluded that prior pleadings are not admissions, and thus were inadmissible. We held that although "prior pleadings cease to be conclusive judicial admissions, they are admissible in a civil action as evidentiary admissions." 638 F.2d at 1084. The party opposing admission of the prior pleading had not raised a Rule 403 argument, and thus neither the district court nor this Court addressed whether the probative value of the pleadings in that case outweighed the risk of confusing jury, the central issue in the instant case. In *Buscaglia,* the district court ruled inadmissiHe an expert report that plaintiff sought to introduce into evidence. We held that the district court erred in ruling that the report failed to meet the standards for admissibility under Rule 702, which governs admissibility of expert testimony. The district court further erred by considering factors that went to the weight of the evidence rather than its admissibility in deciding that the report should also be excluded under Rule 403. Finally, in balancing the Rule 403 factors, the district court failed to account for the fact that the case was tried to the court, and not to a jury.

In stark contrast, the district court here was clearly aware that prior pleadings were generaHy admissi˜e. But in this complex jury trial, the court decided on balance that the pleadings posed a serious risk of confusing the jury, and that this risk outweighed the probative value of the pleadings. In order to minimize prejudice to Dest and ENG, the district court allowed plaintiffs to use the pleadings to cross-examine

witnesses and refresh their recollections. When we review for abuse of discretion, we do not second-guess the considered judgment of the district court. Dest and ENG offer us no reason to believe the district court abused its discretion; rather they appear to be asking us to reweigh the Rule 403 factors in an effort to convince us that these documents were more important to their case than the district court realized, and that the district court overstated the risk of jury confusion. But we do not engage in this kind of reweighing when we review for abuse of discretion. *See United States v. Prevatte,* 16 F.3d 767, 774 (7th Cir. 1994) (in determining if the district court has abused its discretion in making an evidentiary ruling, we shall not second-guess a decision that is in conformity with established legal principles; rather we inquire whether the decision made by the trial court is within the range of options from which one would expect a reasonable trial judge to select). Therefore, we find that the district court did not abuse its discretion here. Accordingly, Dest and ENG are not entitled to a new trial on the contract claim.

D.

Dest and ENG challenge the district court's grant of summary judgment, finding that the Letter Agreement was not an enforceable contract. They also contest the district court's denial of summary judgment on the issue of whether ALCOA could declare a default against the plaintiffs before Peabody declared a default against ALCOA. We can easily dispense with the second claim because the district court's refusal to grant summary judgment, followed by a full trial on the merits, is not reviewable by this Court. *See Watson v. Amedco Steel, Inc.,* 29 F.3d 274, 277 (7th Cir. 1994). In denying a

motion for summary judgment, the district court decides only that the case should go to trial. *Id.* Once the case has gone to trial, denial of summary judgment becomes moot, with one limited exception: in the rare case where the plaintiff notifies the court that it intends to abandon certain claims at trial if summary judgment is denied, we will review the denial of summary judgment. *Id.*, 29 F.3d at 278. This case does not come under the exception and we decline to review the district court's denial of summary judgment.

On the issue of whether the letter agreement constituted an enforceable contract, we review the district court's grant of summary judgment *de novo. Pasqua v. Metropolitan Life Ins. Co.*, 101 F.3d 514, 516 (7th Cir. 1996). We draw all reasonable inferences in the light most favorable to the non-moving party. *Id.* Keeping those standards in mind, the two-page letter signed by Dest and ALCOA represents, at best, an agreement to agree, and under Indiana law such a document does not constitute a binding contract. *See Equiimart Ltd. Inc.* v *Epperly,* 545 N.E.2d 595, 598 (md. App. 1st Dist. 1989). A letter that does not contain definite and specific terms, and that is contingent upon further negotiations and execution of a final agreement, is not a contract under Indiana law. *Id.* The two-page letter agreement here describes a drilling "obligation" and an intent to renego tiate a gas purchase agreement. The drilling obligation is contingent upon the negotiation and execution of an Amended Gas Purchase Agreement." The letter recites various terms that the amended gas purchase agreement is to address, but contains no resolution or specification for these terms. We agree with the district court's conclusion that the letter agreement is much

like the letter of intent in *Equimart*. The district court properly granted summary judgment on this claim.

E.

Finally, Dest and ENG claim they are entitled to a new trial on the contract claim because they were prejudiced in litigating the contract claim in light of the late addition of ALCOA's fraud counterclaim to the case. We have already decided that the district court did not abuse its discretion in allowing ALCOA to amend its counterclaim to add the fraud count. Furthermore, Dest and ENG failed to preserve any objection to the effect of the fraud claim on the contract claim, because they failed to ask for a continuance of the trial date.

AFFIRMED.

A true Copy:

Teste:

/S/_____
Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Decided December 1, 1997

Before

Honorable John L. Coffey, *Circuit Judge*
Honorable Frank H. Easterbrook, *Circuit Judge*
Honorable Ilana Diamond Rovner, *Circuit Judge*

96-4117

Appeal from the United States
District Court for the Southern District of
Indiana, Evansville Division

No. EV 94-110-C-R/H
Gene E. Brooks, Judge.

EASTERN NATURAL GAS CORP.
and DEST EXPLORATION, INC.,
Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF
AMERICA,
Defendant-Appellee.

ORDER

On consideration of the petition for rehearing filed by plaintiffs-appellants on October 17, 1997, all of the judges on the panel having voted to deny to same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

CASE NO. 96-4117

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EASTERN NATURAL GAS CORP.
and DEST EXPLORATION, INC.,
Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division,
The Honorable Gene E. Brooks, Judge

Cause No. EV 94-110-C-R/H

APPELLANTS' PETITION FOR REHEARING

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STATEMENT OF ISSUES
PRESENTED FOR RECONSIDERATION

4. Alcoa never raised the objection that the ENG and Dest Rule 50 motion on the fraud counterclaim was untimely and, consequently, the objection was waived. The Court should consider and grant the ENG and Dest motion for judgment as a matter of law on the ALCA counterclaim.

5. The Court failed to rule on the Appellants' alternative motion for a new trial on the fraud counterclaim. That motion should be considered and granted.

6. Gramercy Mills, Inc. v. Wolens, 63 F.3d 569 (7th Cir. 1995) is controlling and does allow the consideration on appeal of the denial of the ENG and Dest summary judgment motion. The Court should consider the appeal and grant the ENG and Dest motion for summary judgment on the construction of the Agreement to Sublease.

STATEMENT OF THE CASE

Nature of Case, Course of Proceedings And Disposition:

The Court rendered its decision in this case on October 3, 1997. The Court affirmed the jury verdict against Appellants, Eastern Natural Gas Corp. ("ENG") and Dest Exploration, Inc. ("Dest"), on their breach of contract claims against Aluminum Company of America ("ALCOA"), and the jury verdict in favor of ALCOA on its fraud counterclaim. The Court declined to review the ENG and DEST motion for judgment as a matter of law on the counterclaim because, while counsel moved for judgment at the close of Alcoa's case he did not renew the Rule 50 motion at the close of all the evidence. The Court did not rule on the ENG and Dest alternative motion for a new trial on the fraud counterclaim. In addition, the Court declined to review the district court's denial of ENG and DEST's summary judgment motion on construction of the Agreement to Sublease[12], finding that the issue was moot after trial under this Court's holding in Watson v. Amedco Steel, Inc., 29 F.3d 274 (7th Cir. 1994). This petition asks the Court to consider and rule on the merits of each of these three issues raised by ENG and Dest on appeal.

Statement of Facts:

At the beginning of his oral argument in this case, counsel for Appellants volunteered to the Court that he had recently read the Court's decision in Umpleby v. Potter & Brumfield, Inc., 69 F.3d 209 (7th Cir. 1995), which is

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[12] ENG and Dest argued that, as a matter of contract construction, and therefore a matter of law for the court, the Agreement to Sublease (between Alcoa and ENG) did not give Alcoa the right to declare a default until a default was declared under the Lease (between Alcoa and Peabody Development Company).

arguably applicable to the Appellants' appeal of the counterclaim judgment. Neither the District Court nor counsel for Alcoa ever raised the issue of the timeliness of the Rule 50 motion, and the matter was not raised as the result of questions from the bench during oral argument. After raising the issue, Counsel for ENG and Dest argued that Umpleby should not bar consideration of the Rule 50 motion in this case and that Umpleby did not bar consideration of the Appellants' motion for a new trial on the counterclaim in any event.[13]

No other facts, except as have already been presented in Appellants' Briefs, are necessary for an understanding of the issues raised in this Petition.

ARGUMENT

I. Alcoa never raised the objection that the ENG and Dest Rule 50 motion on the fraud counterclaim was untimely and, consequently, the objection was waived.

ALCOA did not claim that the ENG and Dest Rule 50 motion was untimely, either in its briefs to the trial court or in its brief on appeal. In fact, neither party briefed the issue and it came up only because counsel for ENG and Dest raised the question for the first time during oral argument. This Court has repeatedly held that arguments not presented to the trial court are waived and cannot be raised for the first time on appeal. See, for example, In re: Kroner, 953 F.2d 317 (7th Cir. 1992). At least one other Circuit has held that this rule is equally applicable when the timeliness of the motion for judgment is the issue which is raised for the first time on

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[13] The oral argument has not been transcribed. Counsel cannot, consequently, cite to the transcript for support of this argument. However, counsel has listened to the tape of the argument and the discussion of Umpleby is at the very beginning of the argument.

appeal. Gibeau v. Nellis, 18 F.3d 107 (2nd Cir. 1994). In Gibeau, the court of appeals considered appellant's Rule 50, motion even though it had not been made at the close of the evidence at trial. The court ruled that the appellees had waived their objection to the timeliness of the Rule 50 motion by not raising the issue with the district court. Here, Alcoa did not even raise the objection with the Court of Appeals. The Court should reconsider and reverse its determination that Umpleby v. Potter & Brumfield, Inc., 69 F.3d 209 (7th Cir. 1995) prevents consideration of the ENG and Dest motion for judgment as a matter of law.

The Court should not deviate from its normal practice and consider an argument that Alcoa *never* raised. It is true that counsel for ENG brought up the issue of the possible application of Umpleby during oral argument, but, contrary to the determination of the Court (on p. 7 of the slip opinion), counsel did not concede that Umpleby is determinative. Counsel argued that Umpleby should not bar consideration of the ENG and Dest motion for judgment as a matter of law.[14] In other words, nothing that counsel said during oral argument should save ALCOA from strict application of the rule that new issues will not be considered on appeal. Moreover, given the failure of ALCOA to offer credible proof of its reliance and damages, and given the fact that ALCOA was well aprised that ENG and Dest were asserting a right to judgment as a matter of law, considerations of justice weigh in favor of deviation from the Court's strict reading of the Umpleby precedent, not in favor of deviation from the principle that issues not presented below are not preserved on appeal.

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[14] See, note 1 above.

II. The Court failed to rule on the Appellants' alternative motion for a new trial on the fraud counterclaim. That motion should be considered and granted.

As the Court has acknowledged (see, slip opinion at p. 5), ENG and DEST moved for judgment as a matter of law and for a new trial on both the breach of contract claim and on the fraud counterclaim. The Court's ruling that Umpleby bars consideration of the Rule 50 motion should not have effected the consideration of the motion for a new trial.[15] The Umpleby opinion makes clear that a request for a new trial based on insufficient evidence is normally "a viable alternative where a party, as here, might be entitled to judgment as a matter of law but for some reason did not move for judgment at the close of all evidence. 9A Charles A Wright & Arthur W. Miller, Federal Practice and Procedure §2539 at 362 (2nd ed. 1995)." Umpleby, supra, at 212-213. See, also, Mid-America Tablewares, Inc. v. Mogi Trading Co., LTD., 100 F.3d 1353 (7th Cir. 1996) (defendant's motion for a new trial was considered and granted in spite of its failure to preserve its Rule 50 motion for judgment as a matter of law).

Mid America Tablewares involved a contract claim, rather than a fraud claim, but the appeal there, like the appeal in this case, involved a claim that the proof did not support the award of damages. The Court there held that it would not consider the defendant's motion for judgment as a matter of law on the damage issue, because the motion had not been timely made, although the Court did go on to hold (after a

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[15] Counsel is just guessing here that the decision on the Rule 50 motion is related to the failure of the decision to address the motion for new trial; but, there is no way to know. The Court did not deny the motion for new trial; other than acknowledging that the motion was made, the opinion does not address the motion in any way.

considerable review of the facts and the law) that, even if it did consider the motion, it would deny it. Id. at 1365. However, the Court held that the defendant's motion for a new trial on damages should be granted. The Court pointed out that "we take seriously the responsibility of an appellate court to review the sufficiency of the evidence to support the award of damages." Id. at 1368. The Court held that "the size of the jury's award in this case can only be understood as resting on one speculative inference heaped upon another." Id. at 1368. In the case at bar, the jury's award is even less well grounded than the jury award in Mid-America Tablewares.

Alcoa did not prove its fraud claim. Its only evidence was that it "might" have acted differently or "might" have saved money had it learned of the fraud in 1988 or 1989. That evidence is not sufficient to support a $450,000 judgment (later reduced by the trial court to $397,339) and a new trial, consequently, should be ordered. The best that counsel for ALCOA could offer during his argument in response to plaintiffs' Fed. R. Civ. P. 50 motion was that savings had the fraud been discovered (the only basis for the ALCOA damage claim) were *"definitely a possibility."* (Conf. Vol. 8, at 1504.)

This Court has held that in a case like this "the plaintiff must show that, had it not been for the fraud, he would have been spared an injury and thus would be better off." Midwest Commerce Banking Company v. Elkhart City Centre, 4 F.3d 521, 524 (7th Cir. 1993). The district court's denial of a new trial in this case cannot be reconciled with the decisions of this Court, like Midwest Commerce Banking and Mid-America Tablewares, that require damage awards to be supported by more than just speculation.

III. Gramercy Mills, Inc. v. Wolens, 63 F.3d 569 (7th Cir. 1995) is controlling and does allow the consideration on appeal of the denial of the Appellant's summary judgment motion.

The Court determined that the denial of Appellants' summary judgment on the construction of the Agreement to Sublease was "moot." (Slip Opinion at p. 12) There is no indication in the opinion that the Court considered Gramercy Mills, Inc. v. Wolens, 63 F.3d 569 (7th Cir. 1995). Gramercy Mills is controlling and does allow the consideration on appeal of the denial of the Appellant's summary judgment motion.

This court has often stated that review of a district court's grant *or denial* of a summary judgment motion should be de novo. See, for example, Trustees of Indiana University v. Aetna Casualty & Surety Company, 920 F.2d 429 (7th Cir. 1990). More recently, however, this Court has held that "[a]s a general rule, the denial of a motion for summary judgment is not subject to review once the district court has conducted a full trial on the merits of a claim. Watson v. Amedco Steel, 29 F.3d 274 (7th Cir. 1994).

Gramercy Mills, Inc. v. Wolens, 63 F.3d 569 (7th Cir. 1995), makes clear that this Court has not adopted the rigid rule that denials of summary judgment motions will never be reviewed. There, Gramercy filed a pleading which it called "Pretrial Motion" in which it requested that the trial court apply New Jersey law to the case and, alternatively, sought summary judgment. Wolens argued that the choice of law issue was not preserved after trial of the case, apparently arguing from the reasoning in Watson, supra, and similar cases. Gramercy argued that the choice of law issue was distinct from the summary judgment issue and the Court held:

> We agree. Judges, not juries, decide questions of law, such as choice of law issues. Gramercy's motion, at least as far as it pertained to the choice of law issue, was not

> equivalent to a motion for summary judgment, a motion that attempts to avoid a trial based on a lack of disputed facts. See. FED. R. CIV. PRO. 56(c). . . . [T]he choice of law decision is sufficiently independent of the ultimate summary judgment inquiry— whether there are disputed facts that would lead to different legal results depending upon how they are interpreted — to warrant review independent from any available review of the ultimate summary judgment decision. Therefore, we shall review Gramercy's appeal of the district court's choice of law.

Id. at 571 and 572.

The Agreement to Sublease, in Section 2(f), provides that: *"ENG shall be entitled to the exclusive right to exercise all the rights and privileges granted to . . . Alcoa under the Lease . . . ."* (App. A63.) Alcoa declared Dest in default of the *Agreement to Sublease* for the alleged failure of Dest to comply with certain drilling commitments imposed by the *Lease*. The Agreement to Sublease does not provide that Alcoa can declare Dest in default (of the terms of the Lease) before Alcoa receives a notice of default from Peabody. The Agreement to Sublease says just the opposite, it says that Dest shall - "exclusively" - have all the rights and privileges of Alcoa under the Lease. This is strictly a legal issue for which no proof taking at trial is necessary or even allowed. The logical outcome of the Court's decision in this case is that a denial of a summary judgment motion on a legal issue may not be reviewed after trial. That cannot be the law. How else is such a legal issue to be reviewed? Must every legal issue raised in a denial of a summary judgment motion be taken as an interlocutory appeal?

CONCLUSION

This Court should reconsider its decision and review the district court's denial of the ENG and Dest motion for judgment as a matter of law on the ALCOA counterclaim.

Should this Court not reconsider the ENG and Dest motion for judgment as a matter of law or should this Court not grant the motion, a new trail on the fraud counterclaim should be granted because the verdict is against the weight of the evidence and the damages awarded are excessive. ENG and Dest have not waived their claim for a new trial on the counterclaim.

In addition, the Court should reconsider its decision on the ENG and Dest appeal of the district court's denial of their summary judgment. The Court can and should, for the reasons outlined in its Gramercy decision, consider this appeal, and the Court should, for the reasons stated in the ENG and Dest briefs to this Court, overrule the district court's denial of the summary judgment on the interpretation of the Agreement to Sublease.

Dated: October 16, 1997
Respectfully submitted,

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(502) 535-4700

Counsel for Appellants

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Appellants' Petition for Rehearing, was mailed, postage prepaid, to Thomas G. Rohback and Lynn A. Ellenberger, LeBouef, Lamb, Greene & MacRae, 601 Grant Street, Pittsburgh, PA 15219, and to Benjamin C. Cubbage, Jr., P.O. Box 17, 600 Barrett Blvd., Henderson, KY 42420, Attorneys for Defendant, on this 16th day of October, 1997.

_____

D. Duane Cook

Supreme Court, U.S.
FILED
MAR 2 1998
CLERK

No. 97-1458

IN THE
Supreme Court of the United States
October Term, 1997

EASTERN NATURAL GAS CORP.,
and DEST EXPLORATION, INC.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

No. EV 94-110-C

EASTERN NATURAL GAS CORP.
and
DEST EXPLORATION, INC.
Plaintiff,

vs.

ALUMINUM COMPANY OF AMERICA,
Defendant.

AMENDED JUDGMENT

On December 2, 1996, the defendant, Aluminum Company of America, submitted to the Court **Alcoa's Acceptance of Remittitur**. As a result, judgment against the plaintiffs, Eastern Natural Gas Corp. and Dest Exploration, Inc., is now **AMENDED**.

Final Judgment is now entered in favor of Aluminum Company of America, and against Eastern Natural Gas Corp. and Dest Exploration, Inc., on the fraud counter-claim in the amount of $397,339.

Dated: December 11, 1996

/s/_____
Gene E. Brooks,
District Judge
U.S. District Court
Southern District of Indiana

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 94-110-C

EASTERN NATURAL GAS CORP.
and
DEST EXPLORATION, INC.,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA
Defendant.

ORDER

The Court, being duly advised, now DENIES Plaintiffs Motion for Judgment as a Matter of Law and for a New Trial on the Breach of Contract Claim. The Court further DENIES Plaintiffs' Motion for a Judgment as a Matter of Law on the Fraud Counterclaim. The Court GRANTS in part and DENIES in part the Plaintiffs Motion for New Trial on the Fraud Counterclaim: The Court GRANTS a new trial on the issue of damages, unless Alcoa is willing to accept a remittitur which reduces the total damages to $397,338, and DENIES the motion for new trial on all other issues. Finally, this Court ORDERS a Stay on enforcement of the judgment against ENG pending appeal conditioned upon the posting of

a full supersedeas bond.

So entered this 14th of November, 1996.

/s/_____
Gene E. Brooks, District Judge
U.S. District Court
Southern District of Indiana

cc: Counsel of Record

APPENDIX F

EASTERN NATURAL GAS CORP.
and
DEST EXPLORATION, INC.,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA,
Defendant.

Ruling on Post-Trial Motions

I. Introduction

After a trial by jury, the jury returned a verdict in favor of Alcoa on the plaintiffs' breach of contract claim and a verdict in favor of Alcoa for $450,000 on the fraud counter-claim.

This matter is before the Court on Plaintiffs' Motion to Stay Proceedings to Enforce Judgment on the ALCOA Counterclaim, Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Defendant's Fraud Counterclaim, and Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Breach of Contract Claim, all filed September 13, 1996. The defendant filed Defendant's Opposition to Plaintiffs' Motions for Judgment as a Matter of Law and New Trial and Motion to Stay Proceedings to Enforce Judgment on ALCOA Counterclaim, on September 30, 1996. The plaintiffs filed Plaintiffs' Reply to Defendant's

Opposition to Plaintiffs' Post-Trial Motions on October 9, 1996.[1]

II. Standard of Review

A. Judgment as a Matter of Law

Rule 50(b) allows a movant to "renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment..." In order for a party to obtain a judgment as a matter of law subsequent to a jury verdict, a motion for judgment must have been made at the close of all evidence. Fed.R.Civ.P. 50(a), (b).

Federal Rule of Civil Procedure 50(a) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

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[1] On October 15, 1996, defendant filed Defendant's Further Opposition to Plaintiffs' Post-Trial Motions. Thereafter, plaintiff filed Plaintiffs' Further Reply to Defendant's **Further Opposition to Post-Trial Motions** on October 28, 1996. The Court feels that this matter has been fully briefed and no additional briefing is necessary.

The standard for a Rule 50(a) motion for judgment as a matter of law mirrors that for deciding whether to grant a summary judgment motion. See *Shields Enterprises, Inc. V First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir.1992). Judgment as a matter of law is properly entered where no reasonable juror could find for the nonmoving party with respect to a claim or defense. The Court views all evidence in the light most favorable to the non-moving party. *Panter V. Marshall Field& Co.*, 646 F.2d 271,282(7th Cir.), cert. den'd 454 U.S. 1092(1981). The non-moving party is entitled to have the credible evidence considered in its most favorable light, but the court is not required to ignore uncontradicted, unimpeached evidence supporting movant's position. *Id.*

B. New Trial

Rule 59(a) of the Federal Rules of Civil Procedure states:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trial have heretofore been granted in actions at law in the courts of the United States....

A new trial may be granted for three reasons: (1) the verdict is against the clear weight of the evidence; (2) the damages are excessive; or (3) the trial was unfair to the moving party. *Allison V. Ticor Title Ins. Co.*, 9790 F.2d 1187, 1196 (7th Cir. 1992)(citing *Cygnar V. City of Chicago*, 865 F.2d 827, 835 (7th Cir. 1989)). In reviewing a motion for

a new trial, the Court must view the evidence in the light most favorable to the prevailing party. *Id.* The Court cannot set aside the jury's verdict if "there is a reasonable basis in the record which supports that verdict." *Id.* (citing *M.T.Bonk Co. V. Milton Bradley Co.*, 945 F.2d 1404, 1407(7th Cir. 1991)).

III. Contract Claim

A. Judgment as a Matter of Law

Rule 50(b) of the Federal Rules of Civil Procedure state:

> If, for any reason, the Court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal question raised by the motion. The movant may renew its request for judgment as a matter of law...

F.R.Civ.P. 50(b)(emphasis added).

At the end of the plaintiff's case in chief, the defendant made a motion under Rule 50(a) for a judgment as a matter of law. At the end of the evidence, the plaintiff made a Rule 50(a) motion for judgment as a matter of law on the Alcoa counterclaim. It appears as if the plaintiff never made a motion for judgment as a matter of law on their breach of contract claim. Thus, they cannot now renew any such motion. F.R.CIV.P. 50(b).

The Court notes that, even if the issue had been preserved, there is clearly sufficient evidence in the record from which a reasonable juror could have found in favor of the defendant on the breach of contract claim. Judgment as a matter of law is properly entered where no reasonable juror could find for the nonmoving party with respect to a claim or defense. The Court views all evidence in the light most favorable to the non-moving party. *Panter*, 646 F.2d at 282.

In order for ENG to recover on a breach of contract claim, they must establish that they performed their part of the contract. There is a multitude of evidence from which a reasonable juror could conclude that ENG did not perform its responsibilities under the contract, including the drilling requirements and minimum spending requirements. Mr. John Hemphill, Mr. Phil Fassett, and Mr. John Holsinger all testified that ENG/Dest were in default of their contractual obligations. In addition, Mr. Larry Corwin himself testified that ENG/Dest had not met the minimum drilling requirements.

Furthermore, a reasonable juror could have concluded that there was no oil and gas located on the property and thus, ENG suffered no damages. See Testimony of C.A. Robinson (no producing gas and no known fractures); Testimony of J. Michael Gatens (no proved reserves on property).

It is clear that a motion for judgment as a matter of law on the breach of contract claim must be denied.

B. New Trial

The plaintiffs claims that they are entitled to a new trial on the breach of contract claim.

1. Alcoa Misconduct/Failure to Produce Documents

The plaintiffs claim that Alcoa improperly withheld documents during the course of the trial. Under Rule 59, a new trial may be granted if the trial was unfair to the moving party. *Allison V. Ticor Title Ins. Co.*, 9790 F.2d 1187, 1196 (7th Cir. 1992)(citing *Cygnar V. City of Chicago*, 865 F.2d 827, 835 (7th Cir. 1989)). The "failure to disclose information within the scope of proper discovery requests can, in certain circumstances, constitute grounds for a new trial." *Brandt V. Vulcan, Inc.*, 30 F.3d 752, 758 (7th Cir. 1994). In order to prevail in such a situation, the plaintiffs must show "that misconduct occurred and that it prejudiced [them]." *Id.* (citing *Wiedemann V. Galian*, 722 F.2d 335, 337 (7th Cir. 1983)).

The following discussion took place outside the presence of the jury:

Mr. Cook: Your Honor, before we get done, I'd like to take up something if you don't mind.

The Court: Yes.

Mr. Cook: During the course of discovery in this case, of course, Mr. Holsinger's notes and his memos to the Alcoa people and the Alcoa's people memos to him were withheld as privileged. Your Honor, since the privilege has now been

waived, I think we're entitled to a supplemental document production, having all of those documents produced. And I suspect that Mr. Holsinger has his files here to help prepare him for the case, so it shouldn't be a difficult proposition. In any event, those documents could come down from Pittsburgh so that we can have them over the weekend and be prepared for Mr. Holsinger Monday morning.

Mr. Rohback: Your Honor, at this point I don't think he's disclosed any client confidences, but I don't see any problem with that.

The Court: Okay.

Mr. Cook: Your Honor, there was a privileged document log produced by Alcoa, so - -

The Court: I don't know anything about that. He says there's no problem with it.

Mr. Cook: Okay.

(Holsinger Direct, p.29-30.)

It clearly appears to be the case that Alcoa was required to turn over Mr. Holsinger's "notes and memos." Furthermore, Mr. Cook mentioned the "privileged document log produced by Alcoa." There appears to be an agreement to turn over all relevant documents that was previously protected by the attorney client privilege, but, as a result of the waiver of the privilege, are no longer protected.

Eastern Natural Gas Corp. and Dest Exploration, Inc. v. Aluminum Company of America - No. EV 94-110-C

On Monday morning, August 19, 1996, the following discussion took place:

Mr. Cook: Your Honor, because I believe both those issues will come up with this witness, I have prepared -- attorney/client privilege issue and the use of superseded pleading as evidence in this case- -

The Court: I thought there wasn't any issue about the attorney/client privilege. I thought that was all taken care of.

Mr. Cook: Well, your Honor, we have been produced Mr. Holsinger's file, I think, but nothing else, and I think the scope of the waiver in this case was broader than that, and we are entitled to everything that has been previously included as privileged that relates to the Warrick County project, save only the work product with correspondence with outside counsel.

The Court: I have no idea at this stage what that might be or anything.

Mr. Cook: Well, we do because we got a list of those that has been produced earlier in this case, Your Honor. That issue, Your Honor, need not necessarily come up with this witness.

The Court: All right.

Mr. Cook: We'll talk to him just about the privileged material that he produced.

The Court: Okay.

Although it appears that Alcoa may have been required to turn over some additional documents, ENG is not entitled to a new trial because there is no showing of prejudice.

First, the Court cannot determine from the record whether the documents which were not produced fell within the scope of the waiver of the attorney-client privilege. This is an evidentiary issue that needed to be addressed at trial. As seen above, this issue was addressed briefly, but, the parties were able to come to an agreement and the Court did not need to make any specific ruling. The Court will not make a post-trial evidentiary ruling when the parties proceeded with the trial, seemingly with no disagreement and no objections.

Second, the plaintiffs cannot now claim they were prejudiced when they failed to make any objection at the time. The Court is unable to find any indication in the record that the plaintiffs objected to defendant's document production. In fact, it appears that the plaintiffs agreed to continue the trial without the documents. There is no indication that plaintiff ever asked for a stay in the proceedings until such documents were produced. In fact, it appears that the plaintiffs agreed that "We'll talk to him just about the privileged material that he produced.." As a result, the Court cannot find that the plaintiffs were in fact prejudiced by the defendants actions. There being no prejudice arising from the defendants alleged misconduct, this Court cannot grant a new trial.

2. The Exclusion of Prior Pleadings

Eastern Natural Gas Corp. and Dest Exploration, Inc. v. Aluminum Company of America - No. EV 94-110-C

During trial, the plaintiff attempted to introduce into evidence a pleading which was later replaced by a supplemental pleading. The Court made the following ruling during trial:

> Court: There isn't any question it would be improper in my mind to allow any evidence of prior inconsistent legal theories. I think it's improper. Both these cases seem to say if there are material admissions made by a party in a prior pleading, then it goes to the cross-examination of those witnesses, any witnesses concerning any assertions of facts made in a prior pleading. But the fact that he's changed from a negligence to a fraud claim, I think is improper. Only the facts asserted in a prior claim, I'll permit you to question him about.

(Transcript, August 19, 1996, at 9-10).

"[P]leadings are generally usable against the pleader." McCormick on Evidence, Volume 2, p 148 (4th Edition, 1992). The Court believes, however, that there is a difference between pleadings which set forth facts and pleadings which set forth legal theories.

> When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence pf the facts stated. . . .

Huey V. Honeywell, Inc., 82 F.3d 327, 332 (7th Cir. 1996)(emphasis added).

The Court correctly held that portions of prior pleadings which contain admissions of fact were admissible for purposes of impeachment.

> Upon a trial of the issues raised by the pleadings, including the amended complaint, a complaint superseded thereby might well be offered in evidence by the defense if it contains material admissions by the plaintiffs named in the amended complaint. Such evidence would be admissible in order to enable the court to determine the facts upon the issues being tried.

Contractor Utility Sales Co., Inc. V Certain-Teed Products Corporation, 638 F.2d 1061, 1084, ftnt. 30)(citing *Nisbet V. Van Tuyl*, 224 F.2d 66 (7th Cir. 1955))(emphasis added)

Although the Court did not admit into evidence the prior pleadings, the Court did allow the plaintiffs to question witnesses concerning the facts admitted in those pleadings. Thus, the Court properly allowed the plaintiffs to inquire into the facts admitted in the prior pleadings without inquiring into the thought process of changing legal theories.

This ruling was proper under Rule 403 of the Federal Rules of Evidence. Under Rule 403, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." Fed. R. Evid. 403. The Court

determined that the evidence has a strong possibility of unfair prejudice. Particularly if it intrudes on the thought process of ALCOA while preparing for the litigation. Allowing a party to inquire into such evidence would negatively impact a party's ability to prepare for litigation. Furthermore, there was great risk of confusing the jury on the actual issues which were being litigated.[2]

3. Prejudice Created by Alcoa Counterclaim

On August 1, 1996, the Court issued an Order Granting Motion to Amend Counter-Claim. This order was issued approximately two weeks before the start of trial. The plaintiffs claim that they were prejudiced by the fact that they were unable to conduct any substantial discovery. (Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Defendant's Fraud Counterclaim, at 17).

The Federal Rules require leave of court to amend subsequent to a responsive pleading but such leave "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a); *Helm V. Resolution Trust Corp.*, 84 F.3d 874, 879 (7th Cir. 1996). The Court has determined that justice required the amendment, even at such a late date. As the Court noted in its previous ruling:

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[2] The plaintiffs also argues that the Court improperly excluded interrogatory answers. It appears to the Court that the interrogatory answers relate to the superseded pleadings. Thus, the legal analysis under Rule 403 of the Federal Rules of Evidence is similar.

> Obviously, ENG argues that it will be prejudiced by the amendment. ENG anticipates additional discovery and additional briefing. The Court will not deny ENG that opportunity, but more importantly the Court will not deny ALCOA its counter-claim just because it was uncovered at this late date.

The Court now reaffirms its prior holding. The Court believes that an amendment at such a late date was required in the interest of justice. As the Court stated, we "will not deny ALCOA its counter-claim just because it was uncovered at this late date."

Furthermore, the plaintiffs clearly had knowledge that a fraud had been committed, long before the amendment of the counterclaim. Mr. Corwin freely admitted that he committed a fraudulent act. Thus, ENG could have anticipated that such information would be revealed and would possibly lead to an amendment of the counterclaim. The fact that Alcoa did not discover this information until the "eve-of-trial" is no reason to deny them the right to assert the claim. The Court finds that ENG was not greatly prejudiced by the amendment in light of the fact that they had knowledge of the fraud and could have anticipated such action.

4. Error with Respect to Decision on August 20 Letter Agreement

The plaintiffs argued that the Court erred in a previous summary judgment ruling. The Court issued an Order on March 15, 1996 in which it ruled on the parties' summary judgment motions. The Court now reaffirms its prior holding.

For the reasons stated in the March 15, 1996 Order, this Court rules that the 1991 Letter Agreement was not a valid and enforceable contract under the laws of the State of Indiana.

5. The Jury Verdict was Against the Clear Weight of the Evidence

The plaintiffs argue that the jury verdict was against the clear weight of the evidence. As discussed briefly in Section 111(A), there is clearly sufficient evidence from which a reasonable juror could find in favor of the defendant. As a result, plaintiffs are not entitled to a new trial.

IV. Fraud Claim

A. Judgment as a Matter of Law

Under Indiana law, the elements for a claim of fraud are as follows:

(1) a material misrepresentation of past or existing fact
(2) which was untrue
(3) was made with knowledge of or in reckless ignorance of its falsity
(4) was made with the intent to deceive
(5) was rightfully relied upon by the complaining party, and
(6) which proximately caused the injury or damage complained of.

Jordan Demolition Corp. V. Jackson, 657 N.E.2d 450, 452

(Ind. App. 1995). The plaintiffs claim that the defendant failed to establish reliance or damages. (Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Defendant's Fraud Counterclaim, at 3).

1. Reliance

Viewing the evidence in a light most favorable to the non-moving party, the Court finds that there is clearly evidence from which a reasonable juror could determine that the ALCOA relied on the fraudulent acts of the plaintiffs.

It is uncontested that the plaintiffs submitted a forged GeoData invoice to the defendant. Viewing the evidence in a light most favorable to the non-moving party, a reasonable juror could have concluded that Alcoa relied on this forged invoice.

Mr. VanWert testified:

Q: And the purpose of your inspection or your examination was to look at what?
A: It was to review to see if they had met their spending requirements for the first period.
Q: In your memo to Mr. Hemphill, you state that your examination amounted to pulling invoices and check stubs for major expenditures that would support the summary. Was that your practice when you went to ENG?
A: Yes, it was.
. . . . .
Q: --on your copy? Who made those check marks, Mr.

VanWert?
A: I did.
Q: What was the purpose of making those check marks?
A: Just indicated the ones that I had checked, either the invoice or voucher stub.

. . . . .

Q: You have a check mark next to the entry for GeoData Corporation, don't you?
A: Yes.

. . . . .

Q: And did you rely on the invoices and checks that you saw as being accurate and truthful?
A: Yes, I did.
Q: Did you have any reason to believe as you looked at these invoices and check stubs that there were forgeries involved?
A: No, I did not.
Q: And did you rely on them?
A: Yes, I did.

(VanWert direct, 63-63, 68)(emphasis added).

Viewing the evidence in a light most favorable to the non-moving party, a reasonable juror could have concluded that Alcoa relied on the false GeoData invoice when determining whether the minimum spending requirement had been met. Judgment as a matter of law is properly entered only where no reasonable juror could find for the nonmoving party with respect to a claim. Clearly, a reasonable juror could find that Alcoa relied on the fraudulent GeoData invoice.

Furthermore, the vendor analysis forms examined by Mr. Van Wert also contained an entry for a payment to Eastern Reservoir Services at the end of 1988. The evidence, viewed in the light most favorable to the non-moving party, indicates that the money paid to Eastern Reservoir Services was refunded to ENG in the beginning of 1989. (Corwin Cross at 20). A reasonable juror could have concluded that this was a material misrepresentation of fact committed with the intent to deceive Alcoa. Mr. Van Wert testified:

Q: In your review in January 27, 1989, would you have not counted that if you were to find out that Eastern Natural Gas had refunded approximately 90,000 of that 100,000 at the beginning of 1989?

A: I would doubt it. I would certainly need to know more information about it, but that would not seem right.

Q: Did anyone at ENG ever tell you that they had paid back approximately $90,000 of that $100,000 payment?

A: No, they did not.

Q: Is that something you would have wanted to know?

A: I certainly would.

Q: And did you rely on this vendor analysis form to be accurate and truthful in conducting your examination?

A: Yes. I had no reason to believe otherwise.

. . . . .

Q: On this vendor invoice, if you turn to page two, you'll notice there's still an entry there for Eastern Reservoir Services. Do you see that?

A: Yes, I do.

Q: And that still shows that totally payment have been made to Eastern Reservoir Services of a hundred

thousand dollars, doesn't it?

A: Yes, it does.

Q: If ENG had refunded approximately a hundred thousand of that at the beginning of 1989, would you expect that would have been shown on this vendor analysis someplace?

A: If it was a refund of that money for some reason such as an overpayment or whatever, yes.

Q: Did they ever tell you that they were going to, in quotes, prepay Eastern Reservoir Services a hundred thousand dollars?

A: Not that I recall, no.

Q: Would you consider it simply a prepayment if they paid Eastern Reservoir Services a hundred thousand dollars on December 28, 1988, and got it back at the beginning of the year?

A: No, I don't think I would.

Q: And did you rely on the documentation provided to you by Eastern Natural Gas and Dest in reviewing the payments that were made in the second six-month period?

A: Yes.

(VanWert direct at 67, 69-70)(emphasis added).

The testimony of Mr. VanWert clearly provides evidence from which a reasonable juror could have concluded that the alleged payment to Eastern Reservoir Services was a fraudulent misrepresentation relied on by Alcoa. There is clearly evidence in the record to support this finding. Thus, the motion for judgment as a matter of law must be denied.

2. Damage

Judgment as a matter of law is properly entered where no reasonable juror could find for the nonmoving party with respect to a claim or defense. The Court views all evidence in the light most favorable to the non-moving party. *Panter* 646 F.2d at 282. There appears to be two separate allegations of damages: (1) But for the fraudulent acts of the plaintiffs, ENG would have terminated the entire agreement and not incurred any additional costs; and (2) But for the fraudulent acts of the plaintiffs, Alcoa would have found a different operator for the project which needed less administrative overview. Viewing the evidence in a light most favorable to the non-moving party - Alcoa - it is clear that a reasonable juror could have found that damages occurred as a proximate result of the fraud under either damage theory.

Mr. Hemphill testified that ALCOA would have or might have terminated the project if it had not been for the fraudulent acts of the plaintiffs:

Q: All right. Mr. Hemphill, how was Alcoa damaged -- from your perspective as the person administering the Peabody lease and the agreement to sublease, how was Alcoa damaged by the GeoData invoice that has been such an issue in this case?

A: The question is about the GeoData invoice?

Court: Yes

A: The GeoData invoice, as I understand it, identified spending that we believe to be true which helped satisfy the initial period of the lease spending requirement, and had it not been true or had it not

been submitted in a false way, it would have not been satisfied.

Q: And so how were you damaged?

A: We were deceived by ENG into believing that they were performing as they were supposed to.

Q: How did that cost you any money?

A: We continued to work with ENG believing that they were a good operator and truthful in their business relationships.

Q: And how did that damage you?

A: We continued working with ENG for a great, long time, as many as six or eight years, and we dedicated a lot of manpower and resources to working with him in that project. We would have not done that if we would have known that he was a fraud.

. . . . .

Q: So the essence of the damage claim is that you would have terminated the entire project or might have terminated the entire project in 1988?

A: That's correct.

(Hemphill Direct at 109-110, 112).

Additionally, Mr. Holsinger testified that he would have terminated the agreement had he been aware of the fraud:

Q: Mr. Holsinger, if you had found out in 1988 that ENG had lied to Alcoa and had submitted forged invoices to Alcoa, is there any question in your mind that you would have terminated the agreement?

A: No.

Q: And it's one thing if they didn't meet the minimum spending requirement, maybe they could have cured it, but if you found out that they lied to you and they had submitted forged documents to you, is there anything that you think they could have done to cure that type of a deception?

A: No.

Q: If you learned in 1988 or 1989 that Eastern Natural Gas and Larry Corwin were lying and forging, would you have terminated the relationship?

A: Absolutely.

(Holsinger Vol.2, at 88-89).

Mr. Hemphill further testified:

Q: How did that [the fraud] cost you any money?

A: We continued to work with ENG believing that they were a good operator and truthful in their business relationships.

Q: And how did that damage you?

A: We continued working with ENG for a great, long time, as many as six or eight years, and we dedicated a lot of manpower and resources to working with him in that project. We would not have done that if we would have known that he was a fraud.

(Hemphill, at 110).

A reasonable juror could have inferred that Alcoa would have terminated the entire project because of ENG's failure to comply with the spending requirements. The Court

must view all evidence and any reasonable inference therefrom in a light most favorable to the non-moving party - Alcoa. Thus, there is evidence in the record to support a finding of damages.

The plaintiff correctly argues that there is some evidence in the record that Alcoa may have brought another operator onto the land rather that terminating the entire project. Mr. Hemphill stated:

Q: You wouldn't have spent management time trying to develop the property with someone else?
A: We may have.
Q: So if you would have gotten someone else on the property, how were you damaged? In other words, you would have spent the management time anyway, wouldn't you?
A: I don't know.

(Hemphill at 110-112)

Assuming that Alcoa would have brought in a different contractor, there is still evidence that they suffered damages. There is evidence in the record from which a reasonable juror could have concluded that, but for the fraudulent acts of the plaintiffs, Alcoa would have hired a different operator with less administrative costs.

Mr. Holsinger testified:

Q: And in order to prevail on your counterclaim, you have to prove, as I understand it, that if you

terminated ENG, you wouldn't have put anybody else on the property. Is that the substance of your counterclaim?

A: I don't believe that part I'd agree with you. I think we were alleging that we incurred additional costs that we would not have incurred if we brought someone else on the property who didn't requires as must attention from Fassett/Hemphill/Holsinger and other people that we brought in related to this case.

Mr. Van Wert further testified:

Q: Mr. Van Wert, when Mr. Hemphill told you that he was spending or spent 40 percent of his time in 1989 on this project and you put it into the damage calculation that's 545, was the theory that Mr. Hemphill would not have spent 40 percent of his time on the Warwick County project if you had known about the GeoData invoice?

A: That would be the theory, yes.

Q: Okay. How did it-- what do you think? Would this project have gone away in 1989, and would Alcoa have abandoned its interest in the property in 1989 if you'd known about the GeoData invoice?

A: Well, certainly I think it's questionable whether or not we would have continued with this company.

(Van Wert, at 91-92).

The record is full of evidence concerning the special attention which Alcoa gave to ENG concerning the project. A reasonable juror could have concluded, that but for the

fraudulent acts of the plaintiffs, Alcoa would have terminated the relationship with ENG and brought in another company who needed little, if any, supervision. Thus, it is clear that a reasonable juror could have determined that Alcoa suffered damages which where the proximate result of the fraudulent acts of the plaintiffs. For this reason, judgment as a matter of law is inappropriate.

B. New Trial

The plaintiffs argue that a new trial on the counterclaim should be granted because:

(1) The Weight of the Evidence
(2) The Damages Awarded Were Excessive
(3) ENG was Improperly Prejudiced by the Eve-of-Trial Grant of the Alcoa Motion to Amend; and
(4) The Failure to Distinguish between ENG and Dest in the Jury Instructions.

1. Weight of Evidence

The plaintiffs argue that (1) the jury's verdict was against the clear weight of the evidence on the basic elements of the fraud claim, and (2) the jury's verdict was against the clear weight of evidence with respect to the running of the statute of limitations. As the Court discussed in Part IV(A), there is evidence from which a reasonable juror could conclude that the elements of the fraud claim have been satisfied. The jury's finding is clearly supported by the evidence.

The plaintiffs further argue that the jury's verdict was against the clear weight of the evidence presented with respect to the running of the statute of limitations. The Court gave the jury, at the request of the plaintiffs, the following instruction:

> There is an issue in this case arising from a defense asserted by ENG based upon what is called the statute of limitations. This is simply a provision of the law requiring Alcoa to commence their counter-claim for fraud within a prescribed period of time.
>
> In a case like this one the time limit place upon Alcoa began to run when Alcoa first knew, or by the exercise of reasonable care should have known, that ENG committed fraud.
>
> In this instance the applicable limitation period is six years. The alleged fraud occurred in late 1988 and mid-1989. ENG claims that Alcoa should have known, through the exercise of reasonable care, of the alleged fraud by the end of 1989. Alcoa claims that through the exercise of reasonable care they first discovered the alleged fraud in May, 1996 during Larry Corwin's deposition.
>
> As to this issue, you are instructed that ENG has the burden of proof by a preponderance of the evidence.
>
> If it appears from a preponderance of the evidence in the case that Alcoa had information by the end of 1989 which would normally have led a reasonably careful person of the same age, mental capacity, intelligence, training and experience to make inquire through which he would surely learn certain

> facts, then Alcoa may be found to have had knowledge of those facts the same as if he had made such inquiry and had actually learned such facts.
>
> If you find that Alcoa failed to meet the requirements of the statute of limitations, you must find in favor of ENG on Alcoa's counter claim for fraud.

From the jury verdict, it appears that the jury determined, as a factual matter, that the defendant, in the exercise of reasonable care, could not have discovered the fraud at an earlier time. There is clearly evidence in the record from which a reasonable juror could conclude that Alcoa could not of discovered the fraud until after 1989. Alcoa presented evidence that they did not learn of the fraud until after the litigation was commenced. (VanWert Cross, at 93-94) Furthermore, the evidence supports an inference that Alcoa could not have known, through ordinary diligence, of the fraud. There is ample evidence throughout the transcript that ENG committed fraud and that the fraud was effectively concealed. There is no evidence that Alcoa suspected the fraud or had any reason not to trust Larry Corwin. Thus, there is substantial evidence to support the jury's conclusion that Alcoa could not have discovered the fraud prior to the running of the statute of limitations.

2. Damages Award

The trial judge may set aside the jury's verdict only if it is "'monstrously excessive' or there is 'no rational connection between the evidence on damages and the verdict.'." *Joan W. V. City of Chicago*, 771 F.2d 1020 (7th

Cir. 1985)(citing *Abernathy V. Superior Hardwoods, Inc.*, 704 F.2d 963, 971(7th Cir. 1983)). "Reconstructing a jury's thinking from a general verdict is often difficult and fruitless... "*Abernathy*, 704 F.2d at 972.

On the defendants counterclaim, the jury awarded a verdict in the amount of $450,000. The plaintiff claims that the "stipulated amount of the damages claims by Alcoa was only $411,000 and this included the value of all the management time and all the fees incurred on the Warwick Count (sic) project by Alcoa after 1988. (Plaintiffs' Motion for Judgment as a Matter of Law and For a new Trial on Defendant's Fraud Counterclaim, at 16).

It is clear to this Court that the jury award of $450,000 was not "monstrously excessive" compared to the plaintiffs' claim that the defendant suffered, at most, $411,000. The difference of $38,000 is not outrageously excessive. However, this Court must determine whether there is a rational connection between the damage award and the evidence.

It must be noted that in the current situation, the jury chose to award $450,00 in compensatory damages and no punitive damages.

During trial, outside the presence of the jury, the following discussion took place:

Mr. Cook: I will do that without reference to answers to interrogatories or pleadings in the case, but I will want to some how get across to the jury

our agreement that the damages asserted in the counterclaim are this. Can we stipulate to that?

Mr. Rohbach: Right.

The Court: Okay. No problem.

Mr. Cook: Now let me see if I can find our stipulation.

The Court: It's not a very difficult stipulation, is it?

Mr. Rohbach: I've got $397,338 plus $14,715--

The Court: Attorney fees.

Mr. Rohbach: -- attorney's fees. Whatever that number is, that's what our damage number is. As I said, we're also asking for punitive in this case, but that not a number that's calculable.

Mr. Cook: What's the consultant?

Mr. Rohbach: The consultant is $14,187. That's a breakdown of the components of the damages.

Mr. Cook: Do you want to read the stipulation to the jury?

Mr. Rohbach: No.

Mr. Cook: I can tell them that.

Mr. Rohbach: You don't even have to present it as a stipulation. You can simply state, if you want, that defendant's damages in their counterclaim amount to whatever that number is, 400,000-something dollars.

The Court: I think it's better if you both agree. The jury can write it down if they want to.

Mr. Cook: Burley has a good point. My stipulation is going to be that's the claim; that's not what the damages are.

Mr. Rohbach: That's right.

Mr. Cook: Well, Your Honor, I think we have resolved that.

The Court: All right.

(Hemphill direct, p.107-108, 109). Although the parties stipulated to these amounts outside the presence of the jury, there is no indication in the record that this stipulation was in fact read to the jury.

Furthermore, a review of the evidence clearly shows that there is no "rational connection" between the actual damage and the jury award of $450,000. Alcoa offered proof of damages by introducing an exhibit showing the total management time expended by Alcoa to be $383,151. Furthermore, the exhibit indicated that the total consultant fees were $14, 187. Thus, the total amount of damages entered into evidence was $397,338.

There is no evidence in the record to support a jury verdict in excess of $397,338. There is no calculation of attorney fees in evidence.[3] In fact, the exhibit introduced into evidence left the amount of attorney fees blank. There is no evidence that Alcoa would have invested the money over time if it was available to them.[4] The record is devoid of any evidence to support a jury verdict above the amount of $397,338. Any award above this amount would be based on

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[3] The defendant claims they are entitled to attorney fees. However, they introduced no evidence of the number of hours or billing rate for the attorney. Thus, any monetary figure would be mere speculation.

[4] Even if Alcoa was entitled to recover the "time value" of money, this appears to be a request for pre-judgment interest. Under Indiana Code 34-4-37-9, it is the Court, not the jury, which awards pre-judgment interest.

nothing more than mere speculation. Therefore, this Court remands this case for a new trial on the issue of damages unless Alcoa is willing to accept a remittitur which reduces the total damages to $397,338.

3. Motion to Amend Counterclaim

On August 1, 1996, the Court issued an **Order Granting Motion to Amend Counter-Claim**. This order was issued almost two weeks before the start of trial. The plaintiffs claim that they were prejudiced by the fact that they were unable to conduct any substantial discovery. (Plaintiffs' Motion for Judgment as a Matter of Law and for a New Trial on Defendant's Fraud Counterclaim, at 17).

The Federal Rules require leave of court to amend subsequent to a responsive pleading but such leave "shall be freely-given when justice so requires." Fed.R.Civ.P. 15(a); Helm v. Resolution Trust Corp., 84 F.3d 874, 879 (7th Cir. 1996). The Court has determined that justice required the amendment, even at such a late date. As the Court noted in its previous ruling:

> Obviously, ENG argues that it will be prejudiced by the amendment. ENG anticipates additional discovery and additional briefing. The Court will not deny ENG that opportunity, but more importantly the Court will not deny ALCOA its counter-claim just because it was uncovered at this late date.

The plaintiffs clearly had knowledge that a fraud had been committed, long before the amendment of the

counterclaim. In fact, Mr. Corwin freely admitted that he committed a fraudulent act. Thus, ENG could have anticipated that such information would be revealed and would possibly lead to an amendment of the counterclaim. The fact that Alcoa did not discover this information until the "eve-of-trial" is no reason to deny them the right to assert the claim. The Court finds that ENG was not greatly prejudiced by the amendment in light of the fact that they had knowledge of the fraud and could have anticipated such action.

In order to promote justice and judicial economy, the Court finds that it was proper to allow defendant to amend their counterclaim.

4. Jury Verdict

Under Indiana law, "joint tort-feasors" are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing single injury. See *United Farm Bureau Mutual Insurance Co., V. Blossom Chevrolet*, 668 N.E.2d 1289 (Ind. App. 1996). The evidence in the current situation clearly shows that the plaintiffs were acting together in committing the wrong.

Mr. Larry Corwin testified, on cross-examination, that:

Q: Did you prepare a check for GeoData to support this $81,000? Did you actually go so far as to write them a check?
A: Yes, we did.
Q: Did you actually send them a check?

A: No.
Q: Did you have a canceled check, though, that showed it had been deposited available?
A: Yes.
Q: Who deposited it?
A: One of my folks.
. . . . .
Q: And that's a check made out to GeoData for $81,400?
A: Yes, it is.
Q: And the back of it shows an endorsement, and can you read that endorsement?
A: Yes, I can.
Q: And who's it deposited for?
A: It's deposited into Dest Exploration, Inc.'s account.
Q: You have the word "GeoData" up there, don't you?
A: Yes.
Q: So you then deposited this check for GeoData in a Dest account?
A: Yes.

The fraudulent check written by ENG was actually deposited in Dest's bank account. The fact that the check used in committing a fraudulent act was deposited in Dest's back account is some evidence which shows that Dest was actively involved in perpetrating the fraud. There was joint action between tortfeasors which created one wrong. Under Indiana law, it is proper to hold such joint tortfeasors jointly and severally liable.

Thus, there was no error in submitting a joint verdict form to the jury and receiving one against the plaintiffs collectively.

IV. Stay Proceedings

Pursuant to Rule 62(d)of the Federal Rules of Civil Procedure, this Court ORDERS a Stay on enforcement of the judgment against ENG pending appeal conditioned upon the posting of a full supersedeas bond. See *Endress & Hauser, Inc. V Hawk Measurement Systems Pty. Ltd.*, 932 F.Supp. 1147 (S.D. Ind. 1996).

V. Conclusion

The Court, being duly advised, now DENIES Plaintiffs Motion for Judgment as a Matter of Law and for a New Trial on the Breach of Contract Claim. The Court further DENIES Plaintiffs' Motion for a Judgment as a Matter of Law on the Fraud Counterclaim. The Court GRANTS in part and DENIES in part the Plaintiff's Motion for New Trial on the Fraud Counterclaim: The Court GRANTS a new trial on the issue of damages, unless Alcoa is willing to accept a remittitur which reduces the total damages to $383,151, and DENIES a new trial on all other issues. Finally, this Court ORDERS a stay on enforcement of the judgment against ENG, pending appeal, conditioned upon the posting of a full supersedeas bond.

Eastern Natural Gas Corp. and Dest Exploration, Inc. v. Aluminum Company of America - No. EV 94-110-C

So entered this 14th day of November, 1996.

/s/_____
Gene E. Brooks, District Judge
U.S. District Court
Southern District of Indiana

cc: Counsel of Record

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 94-110-C-R/H

EASTERN NATURAL GAS CORP.
and
DEST EXPLORATION, INC.,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA
Defendant.

AMENDED JUDGMENT

This cause, having come on for trial before the Court and the jury, and the issues having been duly tried, and the jury having returned its verdict, which verdict finds for the defendant and reads as follows:

{H. I.}

IT IS SO ORDERED that the plaintiffs take nothing by way of their complaint; and,

IT IS FURTHER ORDERED that the defendant recover from the plaintiffs on the counterclaim in the amount

of Four Hundred Fifty Thousand Dollars and zero cents ($450,000.00).

Dated: September 3, 1996

/s/_____
GENE E. BROOKS, JUDGE
UNITED STATES DISTRICT COURT

Copies: All counsel of record

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 94-110-C-R/H

EASTERN NATURAL GAS CORP.
Plaintiff,

VS.

ALUMINUM COMPANY OF AMERICA
Defendant.

JUDGMENT

This cause having come on for trial before the Court and the jury and the issues having been duly tried and the jury having returned its verdict which verdict finds for the defendant and reads as follows:

[H.I.]

IT IS ORDERED that the plaintiff take nothing by way of their complaint and

IT IS FURTHER ORDERED that the defendant recover from the plaintiff on the counterclaim in the amount of Four Hundred and Fifty Thousand Dollars and zero cents ($450,000.00).

Dated: August 29, 1996

/s/_____
GENE E. BROOKS, JUDGE
UNITED STATES
DISTRICT COURT

Copies: All counsel of record

Supreme Court, U.S.
FILED
APR 8 1998
OFFICE OF THE CLERK

(3)

No. 97-1458

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN NATURAL GAS CORP., and DEST EXPLORATION, INC.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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29 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed a jury verdict against Petitioners Eastern Natural Gas Corp. and Dest Exploration, Inc. (hereinafter collectively referred to as "ENG") for fraud where ENG failed to move for judgment as a matter of law at the close of all the evidence as required by Fed. R. Civ. P. 50(b) and where ENG claims it does not understand the Court of Appeals' reasoning for affirming the District Court's denial of ENG's motion for new trial.

2. Whether the Court of Appeals properly affirmed a defense verdict on ENG's breach of contract claim and properly refused to re-open on appeal the District Court's denial of ENG's motion for summary judgment on the breach of contract issue.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The names of the parties to this proceeding appear on the cover. Aluminum Company of America ("Alcoa") is a publicly traded corporation. Alcoa has no parent company. The less than wholly owned direct subsidiaries of Alcoa have no publicly traded shares. Alcoa has the following non-wholly owned direct subsidiaries: Alcoa (Shanghai) Aluminum Products Company Limited; Alcoa International Holdings Company; Alcoa Latin American Holdings Corporation; Alcoa-Superior International L.L.C.; Capsulas Metalicas, S.A.; Shibazaki Seisakusho Limited; and, Squaw Creek Coal Company. Some of the direct subsidiaries of Alcoa have subsidiaries of their own, but again, any such subsidiaries that are less than wholly owned have no publicly traded shares.

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Fed R. Civ. P. 50 . . . . . 7, 9, 10, 11, 12, 13, 15, 16
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Other Authority

9A Charles A. Wright & Arthur W. Miller,
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No. 97-1458

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN NATURAL GAS CORP., and DEST EXPLORATION, INC.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

FED. R. CIV. P. 50

Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) **Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.**

If, for any reason, the court does not grant a motion for judgment as a matter of law made

at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment -- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) **Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion**

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new

trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) **Same: Denial of Motion for Judgment as a Matter of Law.**

If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event

the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

FED. R. CIV. P. 59

New Trials; Amendment of Judgments

(a) **Grounds**. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in a action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law of make new findings and conclusions, and direct the entry of a new judgment.

(b) **Time for Motion**. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

COUNTER STATEMENT OF THE CASE

Aluminum Company of America ("Alcoa") owned the rights to drill for oil and gas on certain property in Indiana owned by Peabody Development Company ("Peabody"). As a part of these rights, Alcoa had certain obligations to drill on and develop the land. In 1988, Alcoa sublet its rights to ENG in an agreement which required ENG to meet certain minimum spending and drilling obligations. Alcoa and ENG also entered an agreement which obligated Alcoa to buy gas obtained from the land in question. The sublease and the agreement to purchase gas were assigned to Dest Exploration, Inc. (Dest Exploration and ENG will be referred to collectively as "ENG").

ENG filed this action in the United States District Court for the Southern District of Indiana and alleged that Alcoa had breached the sublease and another agreement among the parties. Alcoa initially counterclaimed charging ENG with negligence and with breaching the sublease. During discovery, Alcoa uncovered falsified invoices that were designed to deceive Alcoa into believing that ENG was performing its obligations under the sublease. With leave of the District Court, Alcoa added a counterclaim for fraud. After a two-week jury trial, the jury returned a unanimous verdict in favor of Alcoa on both breach of contract and fraud. Except for a $100,000 downward adjustment in Alcoa's fraud judgment against ENG, the jury's verdict remained undisturbed through an extensive round of post-trial briefs in District Court, culminating in a comprehensive 25-page Order and Ruling by the Honorable Gene E. Brooks on November 14, 1996. R. 76. The verdict was also left undisturbed by the Court of Appeals, both in its unanimous

opinion on the merits and its unanimous Order denying re-hearing.

ENG's petition to this Court is yet another unwarranted attack on the jury's verdict and should be denied. ENG's petition presents no compelling issue of any kind and at best tries to draw this Court into a hypothetical debate about the application of Fed. R. Civ. P. 50.

REASONS FOR DENYING THE WRIT

I. There is no Basis for a Writ of Certiorari on the Judgment Against ENG for Fraud.

As to Alcoa's fraud judgment against ENG, the petition for writ of certiorari presents no compelling reasons for this Court to exercise its discretionary review powers and should be denied. First, ENG contends that the Court of Appeals erred when it enforced Rule 50(b). As discussed in section I.A., this issue is a red herring. ENG cured its failure to renew the Rule 50 motion by moving for a new trial which the District Court fully considered and acted upon. Moreover, despite ENG's failure to renew its Rule 50 motion at the close of all the evidence, the District Court nonetheless entertained and denied the motion on the merits.

Second, ENG contends that the Court of Appeals erred by not analyzing ENG's new trial motion on Alcoa's fraud counterclaim in a detailed written opinion. As discussed in section I.B, there is no need for this Court to compel the Court of Appeals to write down its reasons for affirming the District Court's denial of ENG's motion for a new trial.

A. ENG Presents No Compelling Reasons for Review Regarding ENG's Failure to Renew its Motion for Judgment as a Matter of Law.

Supreme Court Rule 10 makes clear that review by writ of certiorari is not a matter of right but of sound judicial discretion. A petition for writ of certiorari should be granted only in cases where there are special and important reasons for Supreme Court review. This Court has held that "special and important reasons imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Further, this Court has stated that *certiorari* should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties..." *Id.* at 79.

While a traditional and accepted ground for *certiorari* is based in a conflict among the circuits, the purported conflict ENG presents is at best an "academic or ... episodic" problem as discussed by the Court in *Rice*. ENG moved for judgment as a matter of law on Alcoa's fraud counterclaim[1]

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[1] The Court of Appeals accurately recounted the fraud scheme perpetrated on Alcoa by ENG. ENG's President, Larry Corwin, admitted forging invoices and falsifying other documents to convince Alcoa that ENG was meeting its contractual obligations when in fact it was not. Alcoa testified that it was duped by this scheme and "would have 'absolutely' terminated its relationship with Dest if it had known that Corwin was lying and forging documents." *Eastern Natural Gas Corp. v. Aluminum Company of*

(continued...)

at the close of Alcoa's case. The District Court denied the motion, and the trial proceeded with a rebuttal case put on by ENG. Under Federal Rule of Civil Procedure 50(b), ENG's motion for judgment as a matter of law on Alcoa's fraud counterclaim had to be renewed at the close of *all* the evidence in order to be preserved for post-verdict motion practice and appeals. Fed. R. Civ. P. 50; *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir. 1995).

As the Seventh Circuit Court of Appeals' opinion makes clear, ENG "conceded at oral argument" that *Umpleby* was controlling authority. *ENG v. Alcoa*, 126 F.3d at 1000. Relying on this concession, the Court of Appeals held that ENG had waived its Rule 50 argument by failing to renew the Rule 50 motion at the close of all the evidence. *Id.* at 1000.

Now, in contradiction of its position at oral argument below,[2] ENG urges, for the first time ever, that it

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[1](...continued)
America, 126 F.3d 996, 999 (1997); R. 134 at 910.

[2] When ENG acknowledged at oral argument that it failed to file a Rule 50 motion before the close of all the evidence, ENG never argued that it substantially complied with Rule 50. Rather, as noted above, ENG "conceded at oral argument that the [*Umpleby* decision] is determinative here." *ENG*, 126 F.3d at 1000. ENG is bound by this concession. *See United States v. Ortiz*, 422 U.S. 891, 898 (1975)(where Court refused to indulge government's argument that a particular case should not apply because government raised the issue for the first time in a petition for certiorari and because government had previously represented
(continued...)

"substantially complied" with Rule 50(b) and therefore qualifies for a "hardship" type of exception that it believes it has located in cases decided by the Fifth and Sixth Circuits. *See* Petition at 9 *(citing, Borhrer v. Hanes Corp., 715 F.2d 213, 216 (5th Cir. 1983), cert. denied, 465 U.S. 1026 (1984); Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474 (6th Cir. 1990), cert. denied, 498 U.S. 855 (1990))*.

It has long been settled law that a precondition to the District Court's consideration of any post-verdict motion is that the motion first be made or renewed at the close of all the evidence. *Mallick v. International Brotherhood of Electrical Workers,* 644 F.2d 228, 233 (3d Cir. 1980) *(citing Lowenstein v. Pepsi-Cola Bottling Co. of Pennsylvania,* 536 F.2d 9, 11 (3d Cir.), *cert denied*, 429 U.S. 966 (1976)). This is the rule of law that applies even in the circuits which ENG contends have developed a liberal "substantial compliance" exception to Rule 50. *See, e.g., Jones v. Lewis,* 957 F.2d 260, 263 (6th Cir. 1992), *cert. denied*, 506 U.S.

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[2](...continued)
case was determinative).

ENG has waived its "substantial compliance" claim. It is well settled that this Court will not indulge an issue raised for the first time in a petition for writ of certiorari. *See Ortiz, supra*, 422 U.S. at 898. *See also, United States v. Williams*, 504 U.S. 36, 41 (1992)(Supreme Court will not review a claim that was neither pressed nor passed upon below); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976)(Supreme Court will not address assertion which was not considered by District Court or Court of Appeals).

841 (1992); *Roberts v. Wal-Mart Stores, Inc.*, 7 F.3d 1256, 1259 (5th Cir. 1993).

Even the Circuits characterized as "harsh" by ENG, the Third and Eleventh Circuits, permit a party who failed to make a Rule 50 motion at the close of the evidence to make a motion for a new trial, as ENG has in the instant case. *See, e.g., Redd v. City of Phenix City, Alabama,* 934 F. 2d 1211 (11th Cir. 1991) (accepting motion for new trial as alternative for a motion for judgment as a matter of law); *Mallick, supra*, 644 F.2d at 234 (acknowledging that a request for binding jury instructions could satisfy the request for judgment notwithstanding verdict).

ENG thus cured its failure to renew the Rule 50 motion by making a Rule 59 motion which the District Court and Court of Appeals entertained and denied. It is well-settled that a Rule 59 motion for a new trial is a viable alternative where, as here, ENG, because of a procedural blunder, failed to move for judgment as a matter of law at the close of all the evidence. *See Umpleby v. Potter & Brunfield, Inc.,* 69 F.3d 209, 212-13 (7th Cir. 1995); 9A Charles A. Wright & Arthur W. Miller, Federal Practice and Procedure § 2539 at 362 (2d ed. 1995). All circuit courts of appeals agree and Rule 59 makes abundantly clear that a motion for judgment as a matter of law at the close of all the evidence is not a prerequisite for a post-verdict motion for a new trial. *See* Fed. R. Civ. P. 59.

One of the purposes of Rule 50 is to insure that the evidence in the record could properly support a particular verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Here, that purpose has been fulfilled because, despite ENG's failure to renew the motion, the District Court

nonetheless indulged and denied ENG's post-verdict motion for judgment as a matter of law on the basis that there was ample evidence in the record to support the fraud verdict.[3]

Thus, ENG has already received what most parties in its situation are denied -- post-verdict review by the District Court of the matters raised in ENG's motion for judgment as a matter of law. There is no question that, at the District Court level, ENG has already received the same post-judgment review as parties who actually renew their motions at the close of all the evidence. Consequently, ENG suffered no harm despite its procedural blunder. The Court of Appeals though, addressed ENG's non-compliance with Rule 50(b) and, after taking note of ENG's concession that the issue had not been properly preserved, proceeded to enforce the rule. Particularly on these facts, there is no unsettled law

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[3] In its post-verdict motion for judgment as a matter of law on the fraud claim, ENG claimed that Alcoa failed to establish the reliance or damages elements of fraud. R. 124. In denying the motion, the District Court found "that there is clearly evidence from which a reasonable juror could determine that . . . Alcoa relied on the fraudulent acts of the plaintifs." R. 138 at 11. The District Court then cited extensive testimony from the trial to support its conclusion. R.138 at 11-14. The same is true for the damages element of fraud. R. 138 at 14-17.

or circuit conflict[4] here that would warrant review by the Court on writ of certiorari.

B. There is No Need for This Court to Compel the Court of Appeals to Write Down its Reasons for not Ordering a New Trial

ENG's petition urges this Court to exercise its supervisory jurisdiction under Supreme Court Rule 10 to compel the Court of Appeals to provide ENG with a specific written reason for affirming the District Court's denial of ENG's motion for a new trial. ENG seems to be arguing that this issue has somehow been left hanging by the Court of Appeals, when, in fact, the judgment of the Court of Appeals could not be more clear -- the judgment of the District Court is "affirmed." Such a ruling means the entire judgment below is affirmed, including in this case the aspects of the District Court judgment reflecting the District Court's denial

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[4] ENG's contention that there is a conflict among the circuit courts of appeals is unfounded and, as applied to this case, wholly irrelevant. The cases cited by ENG represent application of Rule 50 on a case by case basis and do not demonstrate any substantive conflict among the circuits. Moreover, any alleged conflict among the circuit courts of appeals is irrelevant in the instant case because ENG has moved for a new trial and is not prejudiced in any way by its failure to move for judgment as a matter of law at the close of all the evidence. The better reading of the cases cited is that, on the whole, the courts of appeals have applied the Rule 50 requirement on a case by case basis, without any discernable variations among the circuits in the basic purpose and intent of Rule 50.

of ENG's motion for new trial. ENG's belief that the Court of Appeals could have devoted more time or attention (or text of its opinion) to this issue is simply beside the point and hardly grounds for a writ of certiorari. Indeed, it would have been perfectly appropriate (and unremarkable) for ENG's entire appeal to have resulted in an affirmance without opinion.

ENG's mistaken belief that in affirming a district court opinion, the court of appeals must discuss every issue that was in the district court opinion is not supported in law or reason. "Procedural fairness does not require an appellate court to discuss every issue raised by an appellant." *Kairys v. I.N.S.*, 981 F.2d 937, 940 (7th Cir. 1992); *see also United States v. Carson*, 9 F. 3d 576, 593 (7th Cir. 1993), *cert. denied*, 513 U.S. 844 (1994) (refusing to discuss meritless claims); *Mainiero v. Jordan*, 105 F. 3d 361, 365 (7th Cir. 1997) (noting that an appellate court is not a "performing bear, required to dance each and every tune played on appeal").

Despite the Seventh Circuit's affirmance of the judgment of the District Court, ENG contends that the Court of Appeals somehow refused or neglected to address the motion for a new trial, as if the fraud claim was not included as part of the Court of Appeals decision. However, the Court of Appeals does address the fraud issue in sections A and B of its opinion affirming the district court judgment. *See* Petitioners' Appendix at A6-A8; *ENG v. Alcoa,* 126 F.3d at 999-1000. The Court of Appeals also acknowledged that ENG moved for a new trial on both the fraud and contract claims, and nowhere does the Court explicitly decline to rule on the motion for new trial on the fraud counterclaim. The Court's discussion of the facts of the case also makes it

clear that the jury's verdict against ENG on the fraud claim and the District Court's decision not to grant a new trial is affirmed.[5]

Finally, ENG petitioned the Seventh Circuit Court of Appeals for rehearing on the very same basis -- that the Court failed to address ENG's motion for new trial to ENG's satisfaction. *See* ENG's Petition for Re-hearing, Petitioners' Appendix at A-25. The appellate court unanimously denied ENG's petition, thereby removing all doubt as to whether the Court of Appeals believed ENG should receive a new trial on the fraud claim. December 1, 1997 Order; Petitioners' Appendix A17. ENG has had its many days in court on this issue and has shown no basis for Supreme Court review. The circuit court's decision not only acknowledges that issue, but affirms the judgment below in all respects.

II. The Petition for Writ of Certiorari should be Denied because ENG Cannot Re-open a Summary Judgment Issue on Appeal When the Issue Was Abandoned at Trial and Never Properly Preserved With a Rule 50 Motion.

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[5] The District Court comprehensively considered and rejected ENG's motion for new trial on the fraud claim, for a host of compelling reasons. R. 138 at 17-24. The one piece of the motion that the District Court found meritorious (regarding damages for fraud) was cured a few weeks later when Alcoa filed its acceptance of remittitur of the damage award from $450,000 to $397,339. R. 139. ENG's petition to this Court makes essentially no mention of this ruling.

ENG's third argument focuses on the partial summary judgment motion ENG filed over a year before the trial. When this motion was filed on August 1, 1995, ENG sought partial summary judgment on Counts I and II of ENG's complaint (R. 33), but only Count I has been included in ENG's petition to this Court.[6] The District Court denied summary judgment on Count I (alleging breach of an agreement to sub-lease) on March 15, 1996 due to genuine issues of material fact. R. 76. In so doing, the District Court rejected ENG's contention that Alcoa could not declare ENG in default of the sub-lease unless and until Peabody declared Alcoa in default of the main lease. R. 76. Applying Indiana contract law, the Court characterized ENG's contentions on this point as "specious" and leading to "patently absurd" results. For the rest of the pre-judgment portion of the case in District Court, ENG accepted this ruling. ENG did not renew its motion during the trial or at the close of all the evidence, thereby waiving post-verdict review by the District Court under Rule 50.

After hearing all the evidence, the jury returned a verdict for Alcoa on Count I of ENG's complaint, and the District Court entered judgment. ENG then filed a motion for judgment as a matter of law on Count I under Rule 50, or for a new trial under Rule 59. R. 125. The Rule 50 motion resurrected ENG's "specious" argument from August 1995 that Alcoa could not declare it in default until Peabody declared Alcoa in default. The Rule 50 motion even

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[6] Count II pertained to the August 1991 Letter Agreement, but ENG is not challenging the District Court's or the Court of Appeals' handling of this issue in the Petition. *See* Petition at 8 n.5.

incorporated ENG's summary judgment memoranda on this point. Alcoa opposed the Rule 50 motion for judgment as a matter of law on the grounds that ENG failed to preserve this argument by making the motion at the close of all the evidence. R. 126 at 17-18.

In a comprehensive 25-page Order and Ruling on Post-Trial Motions filed on November 14, 1996, the District Court agreed with Alcoa, yet proceeded to address and reject on the merits ENG's Rule 50 motion for judgment as a matter of law:

> It appears as if the plaintiff [ENG] *never made a motion for judgment as a matter of law on their breach of contract claim.* Thus, they cannot now renew any such motion. F.R.Civ.P. 50(b).
>
> The Court notes that, even if the issue had been preserved, there is clearly sufficient evidence in the record from which a reasonable juror could have found in favor of the defendant [Alcoa] on the breach of contract claim.

R. 138 at 4 (emphasis added). The District Court went on to rule that "[t]here is a multitude of evidence" that ENG did not perform its obligations under the contract and had defaulted, and that, in any event, there was evidence that no oil and gas could be located on the property and thus that ENG had suffered no damages. *Id.* Elsewhere in this ruling, the District Court rejected ENG's request for reconsideration of the March 1996 summary judgment ruling, and expressly

"reaffirm[ed]" its own prior ruling from March 1996. *Id.* at 10.

On appeal, the Court of Appeals held that the denial of summary judgment on ENG's argument that Alcoa could not declare it to be in default had become moot because of the trial on the merits of this claim. In its petition to this Court, ENG argues that the Court of Appeals was in error regarding the issue of whether Alcoa could declare ENG in default without any antecedent default notice from Peabody to Alcoa, an argument deemed to be "specious" and "patently absurd" by the District Court in March 1996.

ENG's petition fails to mention, though, that ENG had already prosecuted this same issue through post-trial motion practice, only to be flatly rejected by the District Court on three different grounds: (a) ENG failed to preserve the issue via a motion at the close of all the evidence; (b) ENG's contract claim as a whole had been completely rejected by the jury, and there was abundant evidence to support the jury's verdict; and, (c) ENG's theory about the necessity of a prior default notice from Peabody was already found to be "specious" and "patently absurd" by the District Court in March 1996 and was expressly "reaffirm[ed]" in response to ENG's "second try" on this point after the trial.

Somehow, ENG managed to ignore and essentially "leapfrog" this three-way defeat in the post-trial motion practice and present its summary judgment argument to the Court of Appeals for review. Following settled law, the Court of Appeals refused to do so, holding that a denial of summary judgment, followed by a full trial on the merits, is not reviewable on appeal.

The Court of Appeals was undoubtedly correct to decline to review this, as multiple authorities well illustrate. "As a general rule, the denial of a motion for summary judgment is not subject to review once the district court has conducted a full trial on the merits of a claim." *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277 (7th Cir. 1994). When deciding a summary judgment motion, a court is deciding "based on the evidence of record, whether there is any material dispute of fact that requires trial." *Waldridge v. American Hoechst Corp.*, 24 F. 3d 918 (7th Cir. 1994). This Court has stated that "denial [of a motion for summary judgment] does not settle or even tentatively decide anything about the merits of the claim." *Switzerland Cheese Association, Inc. v. E. Horne's Marketing, Inc.*, 385 U.S. 23, 25 (1966); *see also Goldstein v. Cox*, 396 U.S. 471, 475 (1970). The law is clear that, and the overwhelming majority of courts have reasoned that, an appellate court need not review an order denying summary judgment once there has been a full trial on the merits of the case:

> to be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial.

Locricchio v. Legal Services Corp., 833 F. 2d 1352, 1359 (9th Cir. 1987) (emphasis added); *see also Holly v. Northrup Worldwide Aircraft Services, Inc.*, 835 F. 2d 1375, 1377 (11th Cir. 1988) ("Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal"); *Black v. J.I. Case Co.*, 22 F. 3d 568 (5th Cir. 1994); *Johnston International Co. v. Jackson National Life Insurance Co.*, 19 F. 3d. 431, 434 (8th Cir. 1994); *Lama v. Borras*, 16 F. 3d 473, 476, n.5 (1st Cir. 1994); *Whalen v. Unit Rig, Inc.*, 974 F. 2d 1248, 1250-51 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1417 (1993); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1068 n. 5 (8th Cir. 1992).

Particularly in view of the full procedural history of this issue below, ENG has shown no basis for yet another post-verdict round of review of the denial of its summary judgment motion under Indiana contract law.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Pending

(4)

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No. 97-1458

IN THE
Supreme Court of the United States
October Term, 1997

EASTERN NATURAL GAS CORP.,
and DEST EXPLORATION, INC.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari filed by Eastern Natural Gas Corp. and Dest Exploration, Inc. (referred to hereinafter together as "ENG") urged, among other things, that:

> The Court should grant this Petition to resolve the question of whether the failure to renew a motion for judgment as a matter of law at the close of all the evidence may be excused where there has been substantial compliance with FED. R. CIV. P. 50 and the purposes of the rule have been met.

Petition at 9. The Brief for Respondent in Opposition raises only one point which is new and not adequately addressed in the Petition. Respondent, Aluminum Company of America ("Alcoa"), contends that ENG has waived its argument that it substantially complied with Rule 50 because ENG "conceded at oral argument that *Umpleby* [*Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir. 1995)] was controlling authority." Brief in Opposition at 9-10. Alcoa asserts that "in contradiction of its position at oral argument below, ENG urges, for the first time ever, that it 'substantially complied' with Rule 50(b) . . ." Brief in Opposition at 9-10.

Contrary to the assertions of Alcoa, ENG has not abandoned its Rule 50 arguments, it has not waived its claim that it is entitled to judgment on the Alcoa counterclaim as a matter of law, and ENG has not waived its right to claim that the Seventh Circuit's decision in this case (which relied upon *Umpleby*) should be overruled.

During oral argument to the court of appeals, counsel for ENG brought up the decision of the court in *Umpleby* in order to comply with his duty to be candid with the court. Rule 3.3 of the MODEL RULES OF PROFESSIONAL CONDUCT provides that:

> (a) A lawyer shall not knowingly:
>
> . . .
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel
>
> . . . .

The implications of the Seventh Circuit's decision in *Umpleby* were not addressed in the briefs of the parties before oral argument because Alcoa had not claimed that ENG had failed to comply with Rule 50, and counsel for ENG was unaware of *Umpleby* until just prior to the oral argument.

A transcript of that part of the oral argument of counsel for ENG which addressed *Umpleby* (at the very beginning of the arguments of the parities) has been prepared by counsel and the transcription appears as Appendix I to this Reply.[1] As can be seen from that transcript, counsel for ENG did concede that *Umpleby* was controlling adverse authority, but counsel went on to point out to the court how unjust the application of *Umpleby* to this case would be. The Rule 50 motion on the Alcoa counterclaim was made at the close of

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[1] The Seventh Circuit does not provide official transcripts of oral argument, but instead provides audio tapes of the argument, which can be made available, as a part of the record, as necessary.

Alcoa's case. Counsel pointed out to the court of appeals that the only "rebuttal" evidence was the reading of deposition excerpts which were read at the close of Alcoa's case, rather than during Alcoa's case (when Alcoa first introduced the depositions), as an accommodation to the court and the parties. Counsel for ENG pointed out during the argument that the evidence was closed and the case ended within a very short period of time after the Rule 50 motion was made. Appendix I at A73-74. Moreover, counsel argued to the court of appeals that, with Alcoa so clearly unable to prove its fraud counterclaim, the grant of a new trial, rather than a judgment as a matter of law, would be a "shame," because Alcoa's evidence was so lacking in support for its claim as to warrant the grant of summary judgment before any new trial or the grant of another Rule 50 motion at the close of the evidence after any new trial. Appendix I at A 74.

In its Petition for Rehearing to the Seventh Circuit, ENG again argued that *Umpleby* should not bar consideration of ENG's Rule 50 motion on the Alcoa counterclaim, and ENG pointed out that Alcoa itself had waived any claim that ENG failed to properly renew its Rule 50 motion because Alcoa had failed to raise the issue with the trial court or with the court of appeals. Petition for Certiorari at Appendix C, A23.

The compliance of counsel to ENG with his ethical responsibilities to point out adverse authority should not be taken in this case as a waiver of the argument that the authority should be overruled. ENG urged during oral argument to the court of appeals that it did substantially comply with Rule 50. Moreover, ENG did not expressly or by implication abandon its argument that it was entitled to judgment as a matter of law on the fraud counterclaim. ENG asserted in oral argument, as it did in its briefs to the court of

appeals, that Alcoa had no proof of reliance or damages with respect to its fraud counterclaim. Appendix I at A74. In the majority of the Circuits the trial court's denial of ENG's motion for judgment as a matter of law would have been reviewed.

The Petition for Writ of Certiorari should be granted for the reasons advanced by ENG in the Petition.

Respectfully submitted:

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APPENDIX

APPENDIX I

Excerpt from Oral Argument in the Court of Appeals for the Seventh Circuit

Eastern Natural Gas Corp. and Dest Exploration, Inc.
v.
Aluminum Company of America

No. 96-4117, Argued May 22, 1997

. . . .

Your honors, this is a wonderfully rich contracts case, breach of contracts case. It should not have been a fraud case.

Before I proceed though, your honors, I need to bring one matter to the Court's attention which is not in the briefs, and which cuts against me. During my preparation for argument in this case, your honors, I became aware of this Court's decision in Umpleby v. Potter, which is a Rule 50 case which says Rule 50 motions must be brought at the end of all of the evidence in the case, pointing out that this Circuit no longer allows exceptions to that rule.

Your honors, I made the Rule 50 motion on the fraud counterclaim at the close of Alcoa's presentation of its evidence. After that time, Plaintiff read certain excerpts of depositions into the record and thereafter did not make another Rule 50 motion. Your honors, however, the reading

of the excerpts of the depositions at that point, was a matter of convenience to the court and the parties. The depositions . . . were sections that were read were the same depositions which Alcoa had read as a part of its case in chief. At the time Alcoa proposed reading of the depositions, I brought to the court's atten . . . I asked counsel for Alcoa whether she was also going to read the parts of the deposition, the depositions that I had designated. In other words, both parties had already said these depositions, these are the parts of the depositions we will put into evidence. She said "no" and the court said under Federal Rule of Evidence 103, "well, you are entitled to read those; you can read those after she reads her part."

At that point I said "well, your honor there are two ways that we can do this: we can read them now, or we can read them as part of the rebuttal, and maybe I can shorten them up as part of the rebuttal. And that's that's what happened, but I did not make a Rule 50 motion at the close of all the evidence in the case, only at the close of Alcoa's case. The case ended roughly 45 minutes or an hour after I made my Rule 50 motion.

Your honors, I did make an alternative motion for a new trial, but it seems a shame to retry the issue of the fraud claim on the evidence that was presented, to raise the issues of whether I can file a summary judgment motion before the new trial, or file another Rule 50 motion at the close of the evidence in the new trial. Your honor, the only evidence of reliance or damages on the fraud claim was that Alcoa might have abandoned the project. Quoting from Alcoa's counsel in argument opposing the Rule 50 motion: "They were considering that, that was definitely a possibility. Larry Corwin and ENG kept this thing alive. Had they been honest about it, this thing might have died back in 1988 and Alcoa

would have saved all that money instead of pursuing a lot of dry holes."

"Definitely a possibilities" [sic] your honor is not proof of reliance or damages. Your honors, unless there are further questions on the fraud claim, I think it has been adequately dealt with in the briefs.

. . . .

I certify that the foregoing is a correctly transcribed excerpt from the record of the Oral Argument in the Court of Appeals for the Seventh Circuit in the matter of Eastern Natural Gas Corp. and Dest Exploration, Inc. v. Aluminum Company of America, No. 96-4117, argued May 22, 1997.

/S/
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Counsel of Record